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No. 16005

VOL. 3086

United States
Court of Appeals
for the Ninth Circuit

Vol. 3073

UNITED STATES OF AMERICA, Appellant,

vs.

OREN E. CUMMINS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

AUG - 4 1958

PAUL F. O'BRIEN, CLERK

No. 16005

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

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Department of Justice,
Washington 25, D. C.

For Appellee:

ERNEST R. MORTENSON,
961 East Green Street,
Pasadena 2, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

Civil Action No. 18798-T

OREN E. CUMMINS,	Plaintiff,
vs.	
UNITED STATES,	Defendant.

COMPLAINT FOR DECLARATORY RELIEF,
AND MONEY DAMAGES

Plaintiff brings this action under the Act of May 29, 1930, 46 Stat. 468; U.S.C., Title 5, Section 691 (d), as amended; also known as Section 1 (d) of the Retirement Act, as amended, for \$760.00 and other relief, and alleges as follows:

1.

Plaintiff is an individual residing at 918 Encanto Drive, Arcadia, California.

2.

Plaintiff retired as an employee of the Internal Revenue Service, Treasury Department of the United States on November 30, 1954.

3.

Plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States.

4.

Plaintiff was more than fifty years of age on November 30, 1954.

5.

Plaintiff on November 30, 1954, had rendered more than twenty years of service in the duty of investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States. [2]

6.

The aforesaid services as alleged in par. 5, rendered by the plaintiff constituted a degree of hazard contemplated by Section 1 (d) of the Retirement Act, as amended.

7.

The life annuity of plaintiff has been computed and granted under Section 4 (a) of the Retirement Act, the Treasury Department and Civil Service Commissioner have neglected and refused to allow plaintiff's annuity under Section 1 (d) of the Retirement Act, as amended. Plaintiff has exhausted all administrative remedies through appeals.

8.

That on information and belief, the Civil Service Commission advised the Treasury Department that all time spent in the performance of duties specified in Section 1 (d) of the Retirement Act, and performed jointly with special agents were creditable toward retirement under Section 1 (d) of the Retirement Act, as amended, regardless of the title

of the position held by plaintiff, if such service is documented. During consideration of plaintiff's application for retirement under Section 1 (d) of the Retirement Act, as amended, the personnel branch of the Treasury Department requested from the Audit Division a documentation of cases plaintiff worked jointly with special agents, and that in response thereto Mr. Fellers, Chief, Audit Division, informed the Personnel Division, there was no record of the cases in which plaintiff worked jointly with special agents. During plaintiff's employment, plaintiff submitted, to the Audit Division, regular monthly reports showing all cases being worked jointly with special agents, and said reports are and were available [3] to Mr. Fellers, Chief, Audit Division, for documentation. The Commissioner of Internal Revenue has refused to recommend to the Civil Service Commissioner plaintiff's eligibility for retirement under Section 1 (d) of the Retirement Act, as amended because the Audit Division failed to document the cases plaintiff worked jointly with special agents. Wherefore, plaintiff prays for judgment, ordering defendant to pay to said plaintiff for the remainder of his life an annuity computed under Section 1 (d) of the Retirement Act as amended; and to pay to plaintiff the sum of \$760.00, this being the difference between an annuity computed under Section 1 (d) of the Retirement Act, as amended and an annuity granted and being paid under Section 4 (a) of the Retirement Act, as amended, representing \$76.00 per month for ten months from December 1, 1954, to and including,

September 1955; and to pay to plaintiff an amount of \$82.00 per month from October 1, 1955, until judgment, this being the difference between computation under Section 4 (a) and Section 1 (d) of the Retirement Act under an Act passed by the last Congress and effective as of October 1, 1955, and such other and further relief as this court may deem proper in the premise.

/s/ OREN E. CUMMINS,
Plaintiff.

Dated at Los Angeles Sep. 26, 1955.

Duly Verified. [4]

[Endorsed]: Filed September 26, 1955.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO DISMISS COMPLAINT

Notice Is Hereby Given that on February 6, 1956, at 10:00 o'clock A.M., in the Courtroom of the Honorable Ernest A. Tolin, Judge of the above-entitled Court, the United States Attorney will move to dismiss the plaintiff's Complaint.

The grounds for the Motion are as follows:

1. Lack of jurisdiction over the subject matter.
2. Failure to state a claim upon which relief can be granted.

The Motion will be based on the plaintiff's Com-

plaint and on the Memorandum of Points and Authorities attached hereto.

LAUGHLIN E. WATERS,

United States Attorney.

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief, Civil Division.

/s/ JOSEPH D. MULLENDER, JR.,

Assistant U. S. Attorney.

Attorneys for Defendant. [5]

Memorandum of Points and Authorities Attached.

[6-8]

Affidavit of Service by Mail Attached. [9]

[Endorsed]: Filed January 20, 1956.

[Title of District Court and Cause.]

ORDER ON MOTIONS TO DISMISS

The above-entitled cause having come on regularly for hearing on the defendant's Motions to Dismiss on March 5, 1956, at 10:00 o'clock A.M., before the Honorable Ernest A. Tolin, Judge of the above Court;

The plaintiff having appeared by his attorney, Ernest R. Mortenson;

The defendant having appeared by the United States Attorney;

The Court having considered the pleadings filed herein, the arguments of counsel, and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed:
That the defendant's Motion to Dismiss for fail-

ure to state a claim upon which relief can be granted be and the same is hereby denied;

That the defendant's Motion to Dismiss for a lack of jurisdiction over the subject matter is granted, insofar as the Complaint seeks relief for moneys to become due in the future; [12]

That the plaintiff is granted leave to amend his Complaint to pray for Judgment for all sums which may have accrued up to the the date of Judgment, and that the plaintiff shall have thirty (30) days from March 5, 1956, within which time to file an Amended Complaint;

That the defendant may have sixty (60) days from the date of service of the Amended Complaint within which time to file an Answer.

Dated: This 14th day of March, 1956.

/s/ ERNEST A. TOLIN,
District Judge.

Presented By:

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney,
Attorneys for Defendant.

Approved As To Form: this 9th day of March, 1956.

/s/ ERNEST R. MORTENSON,
Attorney for Plaintiff. [13]

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Pursuant to order of this Court entered on March 14, 1956, Plaintiff files herein the following amended complaint:

I.

This action is to recover balance due on the retirement annuity of Plaintiff from December 1, 1954 to the date of judgment herein as hereinafter more fully appears. Plaintiff is a citizen of the United States; Plaintiff's claim does not exceed Ten Thousand Dollars (\$10,000.00); and jurisdiction is conferred upon this Court by 28 USC, Section 1,346(a)(2). This suit is further brought for the purpose of obtaining a declaratory judgment, pursuant to 28 USC, Section 2201, that Plaintiff is entitled to retirement as an employee of the Internal Revenue Service, Treasury Department of the United States, under Section 1(d) of the Retirement Act as amended, Civil Service Retirement Act of May 29, 1930, USC, Title 5, Section 691 (d), as amended. [14]

II.

Plaintiff is an individual residing at 918 Encanto Drive, Arcadia, Los Angeles County, California.

III.

Plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offences against the criminal laws of the United States.

IV.

Plaintiff was more than fifty (50) years of age on November 30, 1954.

V.

Plaintiff, on November 30, 1954, had rendered more than twenty (20) years of service in performance of the duties described in Paragraph III above.

VI.

The services described in Paragraph III which were rendered by Plaintiff constituted a degree of hazard encompassed by Section 1(d) of said Retirement Act.

VII.

The life annuity of Plaintiff has been computed and granted under Section 4(a) of the said Retirement Act by the Treasury Department and Civil Service Commission. The Treasury Department and Civil Service Commission, although requested to do so, have neglected and refused to permit plaintiff to retire with the annuity provided under Section 1(d) of said Retirement Act. Plaintiff has exhausted all administrative remedies and appeals. On information and belief the Civil Service Commission has advised the Treasury Department that all time spent in the performance of duties described in Section 1(d) of said Retirement Act and performed jointly with Special Agents were creditable toward retirement under Section 1(d) of said Retirement Act regardless of the title of the position held by Plaintiff, [15] provided such serv-

ices were documented. During the course of Plaintiff's application for retirement under Section 1(d) of said Retirement Act, the Personnel Branch of the Treasury Department requested from the Audit Division a documentation of cases Plaintiff worked jointly with Special Agents. In response thereto, Mr. Fellers, Chief, Audit Division, informed the Personnel Branch there was no record of the cases which Plaintiff jointly worked with Special Agents. During the period of Plaintiff's employment, Plaintiff submitted to the Audit Division regular monthly reports showing all cases being worked jointly with Special Agents and said reports were and are available to the Audit Division and other departments of the Treasury Department for documentation.

VIII.

The Commissioner of Internal Revenue has failed and refused to recommend to the Civil Service Commission that Plaintiff be retired under Section 1(d) of said Retirement Act and the Civil Service Commission has failed and refused to retire Plaintiff under Section 1(d) of said Retirement Act, contrary to the provisions of said Retirement Act.

Wherefore, Plaintiff prays for judgment ordering Defendant to pay to Plaintiff the sum of Seven Hundred Sixty Dollars (\$760.00), representing Seventy-six Dollars (\$76.00) per month for the ten months from December 1, 1954 to and including September of 1955, and in addition thereto to pay to Plaintiff an amount of Eighty-two Dollars

(\$82.00) per month from October 1, 1955 until the date of judgment herein. The said monthly sums of Seventy-six Dollars (\$76.00) and Eighty-two Dollars (\$82.00), respectively, represent the difference between computation under Section 4(a) and Section 1(d) of said Retirement Act. An amendment to said Retirement Act, passed at the last session of Congress and effective as of October 1, 1955, increases the differential between Plaintiff's monthly retirement annuity under Sections 4(a) and 1(d) from Seventy-six [16] Dollars (\$76.00) to Eighty-two Dollars (\$82.00).

Plaintiff further prays for judgment declaring and adjudging the Plaintiff is entitled to be retired under Section 1(d) of the Civil Service Retirement Act of May 29, 1930, as amended, and for such other and further relief as this Court may deem just and proper.

Dated: April 2, 1956.

/s/ ERNEST R. MORTENSON,
Attorney for Plaintiff. [17]

Duly Verified. [18]

[Endorsed]: Filed April 3, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and files this Answer to the Plaintiff's First Amended Complaint.

I.

Answering Paragraph I of the First Amended Complaint, defendant:

Admits that this action is to recover the balance due on a retirement annuity from December 1, 1954, to date of Judgment;

Admits that plaintiff is a citizen of the United States;

Denies that plaintiff's claim does not exceed \$10,000.00, and alleges that the District Court does not have jurisdiction to allow plaintiff's claim in an amount exceeding \$10,000.00;

Admits that jurisdiction is conferred upon this Court by 28 U.S.C.A. 1346(a)(2);

Admits that this suit is further brought for the purpose of obtaining a Declaratory Judgment, pursuant to 28 U.S.C.A. 2201, but denies that this Statute enlarges the jurisdiction of the [19] District Court, which is limited to \$10,000.00, as provided in 28 U.S.C.A. 1346(a)(2);

Admits that plaintiff is entitled to retirement as an employee of the Internal Revenue Service, but denies that he is entitled to retirement under Section 1(d) of the Retirement Act, as amended, Civil

Service Retirement Act of May 29, 1930, U.S.C. Title 5, Section 691(d), as amended.

Except as herein expressly admitted, each and all of the remaining allegations of Paragraph I of the First Amended Complaint are both generally and specifically denied.

II.

Answering Paragraph II of the First Amended Complaint, defendant admits all of the allegations therein contained.

III.

Answering Paragraph III of the First Amended Complaint, defendant denies both generally and specifically each and all of the allegations therein contained, and denies that the plaintiff's duties during employment were primarily the investigation and apprehension of persons suspected or convicted of offenses against the criminal laws of the United States.

IV.

Answering Paragraph IV of the First Amended Complaint, defendant admits all of the allegations therein contained.

V.

Answering Paragraph V of the First Amended Complaint, defendant admits that on November 30, 1954, the plaintiff had rendered more than twenty (20) years of service with the Internal Revenue Department, but denies that plaintiff's duties were such as those described in Paragraph III of the First Amended Complaint. Except as herein expressly admitted, each and all of the allegations of

Paragraph V of the First Amended Complaint are both generally and specifically denied. [20]

VI.

Answering Paragraph VI of the First Amended Complaint, defendant denies both generally and specifically each and all of the allegations therein contained; denies that the services described in Paragraph III of the First Amended Complaint were rendered by the plaintiff, and denies that the services described in Paragraph III of the First Amended Complaint or the services rendered by the plaintiff constituted a degree of hazard encompassed by Section 1(d) of the Retirement Act.

VII.

Answering Paragraph VII of the First Amended Complaint, defendant:

Admits that the life annuity of the plaintiff has been computed and granted under Section 4(a) of the Retirement Act, that the plaintiff requested retirement under Section 1(d) of the Act, and that the plaintiff's request was refused;

Alleges that the circumstances under which the plaintiff was denied retirement under Section 1(d) of the Act are as follows:

On November 4, 1954, the Acting District Director of Internal Revenue at Los Angeles, Harold Hawkins, wrote to the Regional Commissioner of Internal Revenue at San Francisco, California, and requested a determination of the plaintiff's eligibility for retirement under Section 1(d). With the

letter were enclosed the plaintiff's application for retirement, statements from the Chief of the Audit Division, and the plaintiff's group supervisor and plaintiff's personnel folder.

On November 12, 1954, the Chief of the Personnel Branch of the Regional Commissioner's Office, W. J. DeWeese, replied to the letter of November 4, 1954, and advised that the plaintiff was not eligible for retirement under Section 1(d). The reason given was that from an examination of the plaintiff's employment records it appeared that his duties were not primarily the investigation, [21] apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States, but that his duties consisted primarily of examining books and records of tax payers to determine tax liability.

On November 17, 1954, the Chief of the Personnel Branch of the Los Angeles Office, Robert D. Hogan, wrote to the Regional Commissioner and requested that the plaintiff's application be forwarded to the National Office for final decision.

On November 23, 1954, W. J. DeWeese forwarded the plaintiff's application to the Assistant Commissioner, Administration, in Washington, D. C., and asked for a decision as to the plaintiff's eligibility for retirement under Section 1(d).

On December 3, 1954, the Chief of the Placement Branch in Washington, D. C., M. J. Flattery, replied to W. J. DeWeese's letter, and advised that the plaintiff was not eligible for retirement under Section 1(d). The reason given was that although

the Civil Service Commission had informally advised the Treasury Department that all time spent in the performance of specified duties may be creditable toward retirement under Section 1(d) of the Retirement Act, regardless of the title of the position, Mr. Fellers, Chief, Audit Division, had stated that there was no record of the cases which the plaintiff worked jointly with Special Agents, and no record of the degree of hazards; that since plaintiff did not occupy a position approved for inclusion under Section 1(d) of the Civil Service Retirement Act, he was not, in any case, eligible to have his retirement annuity computed under its provisions.

Except as herein expressly admitted, each and all of the remaining allegations of Paragraph VII of the First Amended Complaint are both generally and specifically denied.

VIII.

Answering Paragraph VIII of the First Amended Complaint, defendant: [22]

Admits that the Commissioner of Internal Revenue has failed and refused to recommend to the Civil Service Commission that plaintiff be retired under Section 1(d) of the Retirement Act, and that the Civil Service Commission has failed and refused to retire plaintiff under Section 1(d) of said Retirement Act;

Denies that such failure or refusal is contrary to the provisions of said Retirement Act;

Alleges that the plaintiff is not entitled to retirement under Section 1(d) of the Retirement Act.

Wherefore, defendant prays for a Judgment against the plaintiff as follows:

1. That the plaintiff take nothing by virtue of his First Amended Complaint;

2. For costs of suit, and such other relief as may be proper.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ JOSEPH D. MULLENDER,
JR.,

Assistant U. S. Attorney,
Attorneys for Defendant. [23]

Affidavit of Service by Mail Attached. [24]

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT

Comes now the defendant, United States of America, and objects to Findings of Fact No. 7 as set forth in the proposed Findings of Fact lodged with the District Court on or about December 11, 1957.

Such objection is on the ground that the record of the trial is devoid of any evidence that plaintiff

was subjected to any degree of hazard whatsoever.

Dated: December 13, 1957.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
/s/ RICHARD A. LAVINE,
Attorneys for Defendant. [76]

Affidavit of Service by Mail Attached. [77]

[Endorsed]: Filed December 13, 1957.

In the District Court of the United States, Southern District of California, Central Division

No. 18798-T

OREN E. CUMMINS, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above entitled case having been duly set for argument on November 22, 1957 before the Honorable Ernest A. Tolin, Judge, presiding, Ernest R. Mortenson appearing as counsel for Plaintiff, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney, Richard A. Lavine, Assistant United States Attorney,

appearing as counsel for Defendant, United States of America.

Evidence having been taken and arguments of counsel having been heard, the Court hereby makes the following:

Findings of Fact

1.

The Plaintiff, Oren E. Cummins, a resident of California, was an Internal Revenue Agent from March 26, 1928 to November 30, 1954. [78]

2.

On October 1, 1928, Plaintiff was assigned to what is known as the "Fraud Group" and his duties were to make joint investigations with Special Agents of the Intelligence Division of persons suspected or convicted of offenses against the criminal laws of the United States. Plaintiff performed such duties from that date until November 30, 1954, the date of his retirement.

3.

On November 30, 1954, Plaintiff had reached the age of 70 years. During performance of his duties Plaintiff conducted many joint investigations of so-called "racketeers" suspected of having committed crimes against the Internal Revenue laws of the United States.

4.

In all cases in which a joint investigation of possible tax violations was conducted by Plaintiff and a Special Agent, where the Special Agent recommended prosecution of the taxpayer Plaintiff sub-

mitted a report of his investigation to accompany the Special Agent's recommendation.

5.

The following instructions were issued to Internal Revenue Agents charged with the duty of investigating fraud cases:

“Penalty Cases”

“Especially in fraud cases the investigation should be thorough and complete in every detail and the examining officer should arm himself with knowledge of every phase of the case for the further reason that he should be prepared to be an intelligent witness for the Government in the event of subsequent litigation, either in a civil trial before the Board of Tax Appeals in connection with the determination of penalty liability or in a criminal trial before the United States Federal Courts.

page -8-”

6.

Under Rules and Regulations in force during Plaintiff's [79] tenure, a Special Agent could not recommend prosecution for tax evasion without an accompanying report of the Internal Revenue Agent who investigated the case jointly with such Special Agent.

7.

In the performance of his duties, Plaintiff was subjected to a degree of hazard as great as or greater than the degree of hazard to which the Spe-

cial Agent with whom he conducted the joint investigation was subjected.

8.

On October 18, 1954, Plaintiff made application for retirement under Section 691(d) of Title 5 USCA (Section 1(d)) and submitted certain information in support of his eligibility for retirement under said Section. The application was rejected.

9.

On May 2, 1955 the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

“You have no appeal to the Civil Service Commission since retirement under Section 1(d) must be recommended by the head of the agency. It is not a right to which an employee becomes entitled by virtue of specific services but is discretionary with the Secretary of the Treasury.

Your case has received careful consideration but evidence has not been presented to conclusively prove that you performed the duties of a Special Agent, which is a position approved for coverage under Section 1(d). Therefore, we have no basis for ruling favorably on your appeal.”

10.

On February 7, 1955 the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

“This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

The Treasury Department negotiated with the

Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division [80] has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.

As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission."

11.

The list of positions approved by the Civil Service Commission for retirement under Section 1(d) is as follows:

"Internal Revenue Service
Positions Covered by Section 1(d),
Retirement Act

Alcohol and Tobacco Tax Division:

National Office: Director, Alcohol & Tobacco Tax Division, Chief, Enforcement Branch, Assistant Chief, Enforcement Branch, Technical Advisor, Examiner (Enforcement), Chief, Raw Materials Section.

Field Office: Assistant Regional Commissioner (if eligible because of prior enforcement service), Chief, Enforcement Branch, Supervisor in Charge (Enforcement), Special Investigator, Investigator (all positions designated by the CSC as Criminal Investigators).

Intelligence Division:

National Office: Director, Intelligence Division, Assistant Director, Intelligence Division.

Field Office: (if eligible because of prior enforcement service), Regional Commissioner, Assistant Regional Commissioner, District Director & Assistant District Director, Executive Assistant to ARC, Int., Technical Advisor, Chief, Intelligence Division, Assistant Chief, Intelligence Div., Chief of Branch, Group Supervisor, Senior Internal Revenue Agent (Special Agent), Principal Internal Revenue Agent (Special Agent), Internal Revenue Agent (Special Agent).

Inspection Service:

Group Supervisor and Criminal Assignment Squad, New York (6 in the 1811 Series). In order to be eligible, employee must retire from a covered position." [81]

12.

In a letter dated April 5, 1955, the Secretary of the Treasury by his delegate, informed Plaintiff as follows:

"It is mandatory that an employee occupy a position approved for coverage under Section 1(d) at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of this Section. I am sorry, but we are unable to take any action in your case."

13.

In a letter dated March 2, 1955 the Civil Service Commission informed Plaintiff as follows:

"The office of the Regional Commissioner for the Internal Revenue Service informs us that at the time of your retirement you were not occupying a position which was approved for inclusion under Section 1(d) of the Retirement Act, and that no recommendation could therefore be made for your retirement under this Section.

Under the circumstances there is no authority for your retirement under Section 1(d) of the Retirement Act."

14.

The Secretary of the Treasury refused to recommend Plaintiff's Retirement under Section 1(d) on the ground that Plaintiff was ineligible because at the time of his retirement, he was not classified in a position approved for inclusion under section 1(d).

15.

In refusing recommendation of Plaintiff's retirement under Section 1(d), the Secretary of the Treasury did not consider the type of duties per-

formed by Plaintiff individually nor the degree of hazard to which he was individually subjected in the performance of his duties. [82]

16.

The Secretary of the Treasury in denying Plaintiff retirement under Section 1(d) gave consideration to the general duties of the class of position held by Plaintiff.

17.

The Secretary of the Treasury refused to recommend retirement of Plaintiff under Section 1(d) because of an erroneous interpretation of said Section.

18.

Although advised that Plaintiff had applied for retirement under Section 1(d), the Civil Service Commission failed to determine whether plaintiff was entitled to retirement under Section 1(d).

19.

The Civil Service Commission did not give consideration to the degree of hazard to which plaintiff was individually subjected in the performance of his duties.

20.

The Civil Service Commission gave consideration to the general duties of the class of the positions held by Plaintiff.

21.

The Civil Service Commission negotiated a list of positions covered by Section 1(d) because of an erroneous interpretation of said Section.

22.

At the date of his retirement, Plaintiff was more than 50 years of age and had rendered more than 20 years of service in a position, the duties of which were primarily the investigation of persons suspected or convicted of offenses against the criminal laws of the United States and the service actually performed was of such a nature.

23.

Plaintiff in the performance of his duties was subjected to [83] a degree of hazard contemplated by Section 1(d).

24.

All conclusions of law which are or are deemed to be Findings of Fact are hereby found as facts and are incorporated herein as Findings of Fact.

Conclusions of Law

1.

This Court has no jurisdiction to entertain an action for declaratory relief against the United States to determine whether Plaintiff is entitled to certain benefits under Section 691(d) of Title 5, USCA.

2.

This Court has jurisdiction over the action for money judgment pursuant to the provisions of the Tucker Act, 28 USCA Section 1346(a)(2).

3.

Plaintiff at the time of his application for retirement had satisfied all of the requirements for re-

tirement under Section 691(d) of Title 5, USCA and is entitled to have his annuity computed under said Section.

4.

In rejecting a proposed bill based upon position classification and in enacting Section 691(d), which provides, in part, "In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties rather than the general duties of the class of the position held by such officer or employee," the Congress intended that each application for retirement should be considered on its merits without regard to the particular title of the position held.

5.

The failure of the Secretary of the Treasury and the [84] Civil Service Commission to grant Plaintiff's retirement under Section 691(d) was due to an erroneous interpretation of said Section in that the refusal of such retirement was based upon a classification of positions which had been set up contrary to the provisions of said Section.

6.

Plaintiff has exhausted his administrative remedies.

7.

All Findings of Fact which are or are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed:

That Plaintiff is entitled to money judgment in the sum of Seven Hundred Sixty Dollars (\$760.00); that Defendant shall take nothing in the action; that Plaintiff is hereby awarded costs of suit in the amount of \$.

Dated: This 13th day of December, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

Defendants objections filed December 13, 1957 have been considered.

/s/ ERNEST A. TOLIN,
Judge. [85]

[Endorsed]: Filed and Entered December 13, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Defendant United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 13, 1957.

Dated: February 6, 1958.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
/s/ RICHARD A. LAVINE,
Assistant U. S. Attorney,
Attorneys for Defendant. [87]

Affidavit of Service by Mail Attached. [88]

[Endorsed]: Filed February 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 92, inclusive, containing the original:

Complaint.

Motion and Notice of Motion to Dismiss.

Appearance of Ernest R. Mortensen as attorney for plaintiff.

Order on Motions to Dismiss.

Amended Complaint.

Answer.

Defendant's Trial Memorandum.

Supplement to Defendant's Trial Memorandum.

Plaintiff's Trial Memorandum.

Defendant's Second Supplemental Memorandum.

Objections to Findings of Fact.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Application for extension of time for filing and docketing record on Appeal and Order thereon.

Designation of Record on Appeal.

B. Minute Order of 3/5/56 re hearing on motion to dismiss.

Minute Order of 10/22/56 re trial.

Minute Order of 11/22/57 re Oral argument.

C. Plaintiff's Exhibits 1 to 10, inclusive.

Defendant's Exhibits A to F, inclusive.

D. One volume of Reporter's Official Transcript of Proceedings had on: October 22, 1956.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has not been paid by appellant.

Dated: May 6, 1958.

[Seal] JOHN A. CHILDRESS,

Clerk,

s/ By WM. A. WHITE,

Deputy Clerk.

In The United States District Court, Southern
District of California, Central Division

No. 18,798-T

OREN E. CUMMINS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

October 22, 1956

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Ernest R. Mortenson, 961 East Green Street, Pasadena, California. For the Defendant: Laughlin E. Waters, United States Attorney, By: Richard A. Lavine, Assistant United States Attorney, 600 Federal Building, Los Angeles, California, and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

Monday, October 22, 1956. 1:30 P.M.

The Court: Call our case.

The Clerk: 18,798-T, Oren E. Cummins, v. United States of America, for trial.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. Mortenson: Ready for the plaintiff.

The Court: Mr. Mortenson, the court was impressed with the possibility that administrative remedies have not been exhausted. That seems to have a little more emphasis when we received the Government's supplemental memoranda the latter part of last week. What about that?

Mr. Mortenson: The situation is quite interesting, your Honor. In the file sent the United States Attorney by the Civil Service Commission there was omitted a letter addressed to Mr. O. E. Cummins, 918 Encanto Drive, Arcadia, California, dated May 2, 1955, in which the statement was made:

"Your final appeal is to the Director of Personnel, Treasury Department."

However, despite the fact that the plaintiff had been misled by the Treasury Department itself as to what his remedies were, subsequent to the filing of the memorandum of points and authorities by the defendant I wired the Civil Service Commission, stating that I wished to appeal under the section cited by the defendant, and I have a reply dated October 10, 1956, in which it is stated that the "* * * the [3] decision reached by the Retirement Division in your case is affirmed."

So that this final step has now been taken and the Civil Service Commission itself has affirmed the action of the Retirement Division. I shall offer this in evidence.

Mr. Lavine: Counsel is quite correct. We withdraw our point on that subject.

The Court: I have been bothered in this case by the fact that the fixing of the two per cent shall be on the recommendation of somebody. Is that recommendation a mere ministerial thing or is it one which must follow automatically from the existence of a certain set of facts, or does it involve an element of discretion?

Mr. Mortenson: My interpretation of that provision is that it is primarily ministerial. In my brief I pointed out the fact that at least one Congressional committee thought that it was compulsory for the Secretary of the Treasury to make the recommendation, if the retired person fit within the provisions of the code section.

However, the Dismuke case in the Supreme Court, and the Anderson case in the Ninth Circuit, I believe, are pretty clear on this point, that if the action of the Treasury Department is arbitrary or capricious the court does have jurisdiction, and I believe the cases also clearly hold if there had been a misrepresentation of the law on the part of [4] the Treasury Department, then the court has jurisdiction.

The Court: The exercise of that jurisdiction, though, can only lead us to perform an action that is before this court now, to the rendition of a money judgment. Who exercises the discretion which has been misexercised under your theory by the official who should have made the recommendation?

Mr. Mortenson: Well, if it is a question of mandatory or, rather, the declaratory judgment

part of the complaint, I would like to withdraw that and just leave the prayer for a money judgment.

Now, it is because of the error in interpretation of law by the Treasury Department that the plaintiff here is entitled to a money judgment.

The Court: Of course, the Government comes here and says, "This isn't a matter of a particular class of employee. It is a matter of right, being entitled to two per cent instead of one and one-half." It says, "The employee acquires that right if he has a particular recommendation," and the theory back of the recommendation is that it will bring about the earlier retirement of men who are past the vigorous age which is apparently necessary to subdue these persons who are subject to investigation in criminal cases. It involves, if the Government is right, rather an appraisal of the staff as a whole, than of the particular person whose retirement is in contemplation. And if that is what is to be considered or [5] if those are the things to be considered, I don't know how a court sitting here can appraise those matters.

Mr. Mortenson: I think, your Honor, that argument would have some force if we had a situation where a person requesting retirement for some particular reason should not be retired under that section. For example, if the employee were then under charges of some kind, I should think it would be within the discretion of the department head to refuse to recommend that the person be retired.

But in this case there has been no explanation

of any kind as to why retirement under this section should be refused, except a legal one. There are only two legal reasons given, and that is clear from the Civil Service file.

Reason No. 1, the title which this plaintiff bears is not one which is included in a list promulgated by the Treasury Department for inclusion in retirement under Section 1(d). I went into the history of that in my brief, and I think it is very clear that Congress never intended that any department of the Government should put out lists or should use classifications as a basis for determining eligibility. So that there was an error of law. I believe there the Treasury Department has clearly misinterpreted or misapplied this provision of the Civil Service Code.

Then the next objection that was given was that the plaintiff could not be retired under this section because his [6] work was not primarily that of investigating persons suspected of crimes against the United States. Now, that was put in terms of generality, and not that this particular plaintiff or individual didn't meet the requirements. It is that that class of individuals did not meet the requirements of the Code and, therefore, it becomes——

The Court: They took the view, didn't they, that the class of employment in which this plaintiff was classified was one which dealt primarily with accounting, and that that was not the investigation of persons suspected of crime?

Mr. Mortenson: That is basically the Govern-

ment's position, and that is the principal point which I believe this court is authorized and obligated to settle.

The Court: Tell me, has it been settled for us on a District Court level, at least, by some one of the other cases of this character which have been filed here?

Mr. Mortenson: The Anderson and the Dismuke cases are similar in some respects, but, as far as I know, this is the first plaintiff in the United States who was a member of a fraud squad—I believe the evidence is going to show there are only four or, at the most, six fraud groups in the United States, and in those groups only a small percentage would qualify.

The Court: What happened in the Gibney case?

Mr. Mortenson: The Gibney case is set for trial the 30th [7] of this month before Judge Yankwich.

The Court: I thought perhaps we would have the benefit of a Yankwich opinion by the time this case came up for trial, and that is what I was fishing for. But now that we have had our little colloquy, let's try the case. You try it in your way.

I was merely undertaking to point out to you some of the factors of the case, questions of the case which have particularly seemed to present some difficulty from my reading of the file.

Mr. Mortenson: I take it from your questions that you have read the briefs, so I don't believe that it will be necessary to make any statement about the issues in the case. It might facilitate

matters if we entered the documentary evidence at this point. I believe Government counsel and I are agreed on what should go in.

The Court: All right.

Mr. Mortenson: There are two depositions which have been filed, one of Vincent B. Murphy, presently group supervisor of the fraud group, who has an office in this building, and a deposition of Paris Claypoole, who formerly occupied that position. I should like to offer those at this time.

Mr. Lavine: No objection.

The Court: Received.

(The documents referred to were marked Plaintiff's Exhibits 1 and 2, and were received in evidence.) [8]

[See pages 79-135]

Mr. Mortenson: There is a file which is in the hands of the Assistant United States Attorney, Mr. Lavine, that——

Mr. Lavine: With your permission.

Mr. Mortenson: ——might go in at this time, except there is one problem in connection with that. One of the exhibits contains a list of taxpayers who were subject to a fraud investigation, some of whom were not tried for tax evasion. We thought, as a matter of procedure, it might be advisable to have that list sealed by the court and then reference to it could just be made generally, if that procedure is agreeable.

Mr. Lavine: I would suggest it be stipulated, with the approval of the court, such list only be available to the clerk, this court and the trial

judge of the court, and be sealed and used thereafter, only upon retrial or appeal proceedings, if that is agreeable.

The Court: You are suggesting an in camera inspection of the list?

Mr. Lavine: Yes.

Mr. Mortenson: Yes.

The Court: It is agreeable to the court.

Mr. Lavine: Mr. Mortenson, I suggest we offer the administrative file, less the confidential exhibit, as Defendant's Exhibit A, which includes documents forwarded to us by the Department of the Treasury and the Civil Service Commission. [9]

As Defendant's Exhibit B I have placed in an envelope a list of cases prepared by the plaintiff in this action, which purports to be a list of some two hundred or so cases worked on by him as an internal revenue agent, involving suspected fraud cases, during the course of 27 years.

The Court: The exhibits offered are received.

(The document referred to were marked Defendant's Exhibits A and B, and were received in evidence.)

The Court: When you say "suspected fraud cases", are you referring to cases in which persons were suspected of civil fraud only, or how are you using the term "fraud"?

Mr. Mortenson: Criminal fraud. In all cases there was a suspicion that the taxpayer had been engaged in some criminal tax evasion.

Mr. Lavine: That is likewise the sense in which I used the word "fraud", your Honor.

The Court: All right.

Mr. Mortenson: A few of those exhibits have not been copied for my file, your Honor. Will it be necessary to get a court order to have copies made?

The Court: I think they are just available to you. You can copy them or have your secretary come in and make copies. The court record will be available, except for that Exhibit B of the defendant's, which I understand is restricted to my view. [10]

Mr. Lavine: By my stipulation I meant to include, also, counsel for plaintiff, who is well aware of the contents.

The Court: All right. Well, it will be available to your use then. I take it the object is to prevent the use of names here as persons who had been suspected of criminal action when it was administratively decided that the facts did not warrant prosecution.

Mr. Mortenson: That is correct, your Honor.

As Plaintiff's Exhibit 3 I should like to offer a letter dated October 10, 1956, addressed to the plaintiff by John E. Blann, Chairman of the Board of Appeals and Review.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 3 and was received in evidence.)

[See pages 136-137]

Mr. Mortenson: As Plaintiff's Exhibit 4, a letter addressed to the plaintiff, dated May 2, 1955,

signed by M. Latham, Jr., Acting Director, Personnel and Training Division.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 4 and was received in evidence.)

[See pages 137-138.]

Mr. Mortenson: As Plaintiff's Exhibit 5, a letter dated February 7, 1955, addressed to the plaintiff by Mr. M. J. Flattery, Chief, Placement Branch.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 5 and was received in evidence.) [11]

[See page 139]

Mr. Mortenson: Plaintiff's Exhibit 6, a letter dated April 5, 1955, addressed to the plaintiff by Mr. Flattery.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 6 and was received in evidence.)

[See pages 140-141]

Mr. Mortenson: As Plaintiff's Exhibit 7, I would like to offer an excerpt from an instruction manual entitled "Penalty Cases", prepared by the Special Adjustment Section, Income Tax Unit, April, 1935. The excerpt appears at page 8.

The Court: Received.

(The document referred to was marked

Plaintiff's Exhibit 7 and was received in evidence.)

[See page 141]

The Court: I take it, Mr. Mortenson, that upon these facts which you are now establishing or expect to establish by this and what other evidence you bring in, the court would be compelled to find there was only one way in which the discretion could be exercised?

Mr. Mortenson: I should like to make that statement. When I used the word "compelled" I meant to say I thought the court would be compelled to make a decision. It had jurisdiction, and it would be an issue of law on which the court would be compelled to make a decision. In other words, it is not the class of case where an administrative officer has used his discretion in determining what action should be taken on a particular set of facts. I believe there will be no factual [12] dispute in this case.

The Court: Well, suppose that the administrative officer has reached his administrative decision on a misconception of the law. He thought he should use one standard when he actually should have used another? Do we then use the standard he should have used? Would it not be more proper—but certainly not under this state of pleadings—for us to send it back to him and say, "Now, this is the standard you should have used. Go ahead and use it"? The sort of thing that might arise upon a suit based upon one of the extraordinary writs, for instance.

But in an action for money damages we can't do that. We either exercise his administration for him, we apply the standard he should have applied and find it adds up to a different rule than the arbitrary standard which he improperly applied, or we just substitute our judgment for his, or we find that he had no place in it except the performance of a ministerial act, that under these facts there is no possibility for anything except a determination that the two per cent should have been used instead of the one and a half.

Mr. Mortenson: Well, I would like to stand on two grounds. One is that this is purely a question of law, particularly related to the use of the word "primarily".

But I believe I have an alternate ground, and, that is, the action was arbitrary. [13]

The Court: But how could we tell it would have reached a different result if it had been considered in a judicious instead of a capricious and arbitrary manner?

Mr. Mortenson: I would be very happy for a decision in my favor on either ground.

Mr. Cummins, will you take the stand, please?

OREN E. CUMMINS

the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): Mr. Cummins, would you state your full name?

(Testimony of Oren E. Cummins.)

A. Oren E. Cummins.

Q. Is this your first appearance in the federal court, Mr. Cummins?

A. No, it is not; there have been many.

Q. Could you estimate the number of days you have been a witness in federal court in an official capacity?

A. In an official capacity?

Q. As a government agent.

A. Somewhere between a thousand and three thousand days.

Q. What is your present occupation, Mr. Cummins?

A. Public accountant.

Q. What was your occupation before you became a public [14] accountant?

A. Internal Revenue agent.

Q. When did you leave the employ of the Government as an internal revenue agent?

A. November 30, 1954.

Q. When did you begin service as an internal revenue agent?

A. I entered the Service March 26, 1928.

Q. At the time that you were so appointed, were you given a specific assignment?

A. No, I was not.

Q. What did you do when you first became an agent?

A. The time I became an agent, up till October 1st, 1928, I was assigned with another internal revenue agent for the purpose of instruction and learning how to be an internal revenue agent.

Q. And after that assignment, what happened?

(Testimony of Oren E. Cummins.)

A. On October 1st, 1928, I was assigned to what is known as the fraud group, Los Angeles Division.

Q. At that time was a letter written with respect to your assignment? A. Yes.

Q. I show you a document which is part of Defendant's Exhibit A, bearing the date October 1, 1928, addressed to you and signed by S. S. Stahl, and ask you whether that is the [15] letter to which you refer.

A. That is a photostat of the original letter which I have. No, I beg your pardon. It is not. That is a photostat of a typed copy of the original.

Q. Do you have the original? A. Yes, I do.

Q. Is this an accurate copy of the original?

A. With the exception of the signature of S. S. Stahl.

Mr. Mortenson: Very well. May we have this read at this time, your Honor?

The Court: Yes.

Q. (By Mr. Mortenson): Would you read that letter? Just read the body of it, please.

A. (Reading) "Due to the accumulation of work being handled jointly with the Intelligence Unit, it has become necessary to assign additional agents to assist in this work for an indefinite period.

"You have been selected as one to assist. Please get in touch with Internal Revenue Agent Warner E. Williams at your earliest convenience and arrange to work under his direct supervision until

(Testimony of Oren E. Cummins.)

released from that class of cases. As soon as this joint work is brought up to date, your services will again be utilized by your regular Group Chief, but during this assignment he will be relieved of all [16] supervision over your work."

The Court: What was the date of that?

The Witness: October 1, 1928. That is the time I had completed training.

The Court: Did you receive it at or about that time?

The Witness: No, I received it at that time.

Q. (By Mr. Mortenson): Will you state what accounting and legal training you have had, Mr. Cummins?

A. I am a graduate from the Kansas State University of Accounting. I took a course with a higher accounting firm in Los Angeles, whose name is Racine.

Q. Was it the Racine Institute of Accounting?

A. Racine Institute of Accounting, that is correct. And I finished a course of law with Blackstone University, from which I received an LL.D.

Q. That was an LL.B.? A. LL.B.

Q. That was a correspondence course, was it?

A. That is correct.

Q. Do you know, Mr. Cummins, or have you been advised as to the number of fraud groups that exist in the United States at the present time?

A. I do not know, except from observation and what I have been told there were. I do know for a certainty with respect to a couple of divisions,

(Testimony of Oren E. Cummins.)

that Chicago had a fraud [17] division at the time I went to Chicago one time on one of my cases. Seattle had a fraud division. I understand that New York had a fraud group. I believe there was one in Texas; I believe it was Dallas, I am not sure. Probably one in—I have had information there is one in Cincinnati.

Q. That is, there probably are not more than six fraud groups in the United States at this time?

A. I believe that would be correct, yes.

Q. As to the number of individuals in these fraud groups who might in any way satisfy the requirement of Section 1(d), you say the number would be under 100?

A. Oh, yes, I believe they would be much under 100.

Q. At the time of your retirement, did you apply specifically for retirement under Section 1 (d)?

A. I did.

Q. Without referring specifically to your own experience, what are the respective duties of a revenue agent and a special agent who work jointly on a fraud case? By that I mean a criminal tax fraud case.

A. Did you want me to outline the duties of each or the difference between them?

Q. I think if you would just state generally the duties of each, then we could make the comparison.

A. Well, to begin with, cases in which criminal evasion of income tax is involved, the cases arise

(Testimony of Oren E. Cummins.)

from two sources. [18] One is in the revenue agent's office and another in the special agent's office.

Years ago, the early years of high service, if it originated in the special agent's office it would be forwarded to the internal revenue agent's office and all cases there were assigned to the group that handled the fraud work. And the group supervisor would assign these cases to the various men under his supervision. All these cases so assigned—most all of them contained an information of some sort, some bookkeeper of a taxpayer or some friend or someone who stated that this particular taxpayer had been evading his income tax by this and by that method. After the case was assigned the revenue agent would proceed to investigate these charges. After the investigation had proceeded to a point where the revenue agent felt in his own mind that a criminal evasion of the income tax had been committed, it was his duty to call upon a special agent for cooperation in the case. At this point the special agent would join the revenue agent in the investigation, and the two agents would work together, both within the taxpayer's office, outside securing witnesses or any evidence that might be necessary to sustain the evasion case.

After evidence or information regarding the case had been gathered, it was the duty of the revenue agent to write his report. This report consisted of two separate reports. One we called a techni-

(Testimony of Oren E. Cummins.)

cal report, in which a computation was [19] made of net income, tax and penalties, if any were involved.

A second report, which was known as a confidential report, in which all evidence of whatever nature may have been gathered, was assembled, and in this report any statements that the taxpayer may have made that might be detrimental to him or evidence secured from witnesses other than the taxpayer, copies of books and records and bank accounts were all submitted in this confidential report.

At the end of this report we made our recommendation. This report—these two reports, after being typed, were sent to the special agent's office, after which they wrote their report and made their recommendations.

Q. In general, was this the procedure followed during the whole period during which you were an internal revenue agent? A. Yes.

Q. Under the rules and regulations in force during that period, was it possible to have a criminal tax evasion case without a revenue agent or deputy collector being assigned to the case?

A. No, I do not believe it would be possible; no.

Q. What is one essential that would be part of the revenue agent's work and part of the revenue agent's report, which would preclude the special agent from turning a case over for prosecution?

A. It would be the auditing feature and the writing of what we called the technical report,

(Testimony of Oren E. Cummins.)

which was a computation of income, taxes and penalties.

Q. In a joint investigation for tax fraud during the period of your tenure did a special agent have authority to order you to do any particular act?

A. He did not.

Q. Did the special agent with whom you worked have any disciplinary control over you?

A. No.

Q. In whom did supervisory and disciplinary powers rest insofar as you were concerned?

A. To the internal revenue agent in charge, through my group supervisor.

Q. And in the case of the special agent who cooperated with you in the investigation, who had supervisory powers over him?

A. The group—the special agent in charge, through the group supervisor in his office.

Q. In the actual conduct of an investigation of a tax evasion case, is there or was there a division between the criminal aspects of the case and the non-criminal aspects?

A. None that I could ever observe.

Q. Would you explain what those words mean as they have been used in various courts? I will withdraw that question. [21]

Did you ever investigate a criminal tax case in which you had practically completed the investigation before you referred the matter to the Intelligence Division? A. Yes, I have.

Q. In such a case, what would the function of the special agent be who was assigned to that case?

(Testimony of Oren E. Cummins.)

A. Well, I don't know what his functions might be. I know what they do.

Q. Tell us what——

A. They take the revenue agent's report and follow it and make their recommendations. That doesn't happen very often.

I would like to explain in particular with respect to one case which might clear up the reason for such cases evolving. I had a case a number of years ago which the taxpayer or corporation claimed on the return a loss of \$80,000.00. I had to finish that case before I knew whether I could overcome the \$80,000.00 loss and set up a tax. That was the reason that a special agent would not be called in until the case was completed. And in this case a fraud penalty was asserted and the special agent recommended criminal prosecution. I have forgotten whether I recommended criminal or not. I have recommended criminal in many cases.

Mr. Mortenson: May I use this confidential list, your Honor, to show to the witness? [22]

The Court: Yes.

Q. (By Mr. Mortenson): Mr. Cummins, I show you a list of names under dates, and ask you whether that is a list which you yourself prepared. A. It is.

Q. This is a list of taxpayers that were investigated by you for possible crime against the internal revenue laws of the United States, is that correct? A. That is correct.

(Testimony of Oren E. Cummins.)

Q. I show you a newspaper clipping which carries in the top left-hand corner a picture, under which is the name "Sol Zemansky". Does that name appear on your list? A. It does.

Mr. Mortenson: I should like to offer this into evidence as the Plaintiff's next in order.

The Court: Received.

The Clerk: Plaintiff's 8.

(The document referred to was marked Plaintiff's Exhibit 8 and was received in evidence.)

Q. (By Mr. Mortenson): I show you another newspaper clipping bearing the heading "U. S. Suit on McAfee Perturbs Politicians", and ask you whether that refers to a case which you investigated. A. It does. It is on this list.

Mr. Mortenson: I would like to offer this as the Plaintiff's [23] next in order.

The Court: Received.

The Clerk: Plaintiff's 9.

(The document referred to was marked Plaintiff's Exhibit 9 and was received in evidence.)

Q. (By Mr. Mortenson): On this list which you hold in your hand, are there names listed of individuals that were considered to be racketeers and questionable characters?

A. Yes, on this list, from the year 1931 to 1941 everyone, with the exception of one, is considered racketeers, gamblers, and there are others in other

(Testimony of Oren E. Cummins.)

years, but those ten years I worked practically nothing except racketeers.

Q. Mr. Cummins, what proportion of your time, from your appointment to the fraud squad in 1928 to the date of your retirement November 30, 1954, was devoted to investigation of taxpayers who were suspected of crimes against the United States?

A. All my time with the exception of perhaps a year or 18 months.

Q. As between the revenue agent and the special agent who worked a joint fraud investigation, which one is likely to spend more time with the taxpayer's associates and employees?

A. The revenue agent spends much more time.

Q. During the period of your employment did you keep a count of the hours and days spent on fraud work? [24]

A. Yes, I did.

Q. In the ordinary fraud case, during your tenure, who would be most likely to first contact the taxpayer, the revenue agent or the special agent?

A. The revenue agent.

Q. Mr. Cummins, I show you a copy which bears the legend "Internal Revenue Service Positions Covered By Section 1(d), Retirement Act", and ask you whether that is a copy of a list you received from the Treasury Department accompanying a letter dated February 7, 1955, signed by M. J. Flattery, Chief, Placement Branch.

A. It is.

Mr. Mortenson: This is offered as Plaintiff's No.——

(Testimony of Oren E. Cummins.)

The Clerk: 10.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 10 and was received in evidence.)

Q. (By Mr. Mortenson): In your experience in investigating criminal fraud cases, Mr. Cummins, would you say that you were exposed to danger as much as or less than a special agent with whom you worked?

A. I would say more than, because we spent more time with the taxpayer and employees.

Q. With respect to the so-called racketeers whom you investigated, would that statement apply? [25] A. Yes.

Q. Did you ever investigate a criminal tax case in which there was a double set of books?

A. Yes.

Q. Who audited the books?

A. I audited them.

Q. Did the special agent assigned to that case have any part in the auditing of those books?

A. He never saw the books.

Q. In a criminal tax fraud investigation, where admissions were made by the taxpayer, what was done insofar as your activities were concerned with respect to those admissions?

A. They were pointed out in my report. Usually any admissions or statements were taken under oath from a taxpayer, and they would be included as an exhibit within my report.

(Testimony of Oren E. Cummins.)

Q. Were there cases where damaging or incriminating admissions had been made by taxpayers to you? A. Yes.

Q. And in those cases was it also your practice to include a report of such admissions in your revenue agent's report? A. Yes.

Q. Did you testify in court concerning your audit and admissions made by the taxpayer? [26]

A. Many times, both criminal and civil.

Q. Did you investigate a number of cases in Phoenix, Arizona? A. I did.

Q. In one of those cases did you testify at length for the Government?

A. I was on the witness stand for the Government two weeks.

Q. Two weeks? A. Yes.

Q. Now, in that particular case did the special agent testify?

A. He was on the stand and answered one question.

Q. During your experience as a government internal revenue agent in these criminal fraud cases, with respect to the ones which went to trial, did you spend more time on the witness stand as a witness than all of the special agents you worked with combined, or less time?

A. I spent much more time. As a matter of fact, I only recall two of my cases in which a special agent appeared as a witness in a criminal.

Q. Do you recall that you previously stated that it was your practice to make a recommenda-

(Testimony of Oren E. Cummins.)

tion for or against criminal prosecution in the cases which you investigated?

A. I never did make a recommendation against criminal [27] prosecution. I have made many recommendations for criminal prosecutions. If I didn't think the Government had a good case I would not recommend criminal prosecution because I didn't want to have the special agent quarrel with me and say it should have been recommended otherwise, so I left it open.

Mr. Mortenson: You may cross-examine.

Mr. Lavine: Prior to cross-examining, your Honor, may I ask the court's permission to introduce a few documents through Mr. Machtinger, who is regional counsel of Internal Revenue in this area.

The Court: Yes. You mean he is going to start trying the case?

Mr. Lavine: No.

The Court: You represent the Government?

Mr. Machtinger: I will merely introduce the documents. I think I am more familiar with the documents than Mr. Lavine.

The Court: Are you then taking the position of a witness here?

Mr. Machtinger: No, I am entered as co-counsel for the defendant.

Mr. Lavine: Your Honor, I don't believe there is any objection to these exhibits from counsel.

The Court: Are you an Assistant United States Attorney?

(Testimony of Oren E. Cummins.)

Mr. Machtinger: No, sir, I am an attorney admitted to practice in the State of California, an attorney for the [28] Internal Revenue Service.

Mr. Mortenson: I have no objection, your Honor, to Mr. Machtinger appearing here. I don't mean to intrude on your province, but I will be very happy to have him take part in the trial.

The Court: All right, we will allow him to take part, although it is most irregular.

Mr. Mortenson: Personally I have been in the same situation, as you know, your Honor, and I have a great deal of sympathy for this technical approach. As a matter of fact, I think there was a time when you yourself argued that counsel in the chief counsel's office should be permitted to take part in the trial of cases.

The Court: Yes, but I was usually overruled in presenting such argument. I find, in allowing this participation today, I am considerably among the minority among the judges of the court. We will permit it.

Mr. Machtinger: Thank you, sir.

I would like to offer as Defendant's Exhibit next in order a document which is entitled "Procedure With Respect To Income Tax Fraud Cases", which is dated January 30, 1936, and designated as "Commissioner's Mimeograph Collection No. 4418."

The Court: Received.

Mr. Machtinger: The purpose of offering this document is to set forth the procedure that was in effect on January, I [29] believe I said 30th. It

(Testimony of Oren E. Cummins.)

is January 20th, 1936, and years subsequent to that.

The Court: You might show what the prescribed procedure was, what the book procedure was. It will be admitted and you can argue its effect when the time comes for argument.

The Clerk: Defendant's Exhibit C.

(The document referred to was marked Defendant's Exhibit C and was received in evidence.)

Mr. Machtinger: I would like to offer as Government's Exhibit next in order a document entitled "Procedure With Respect To Income Tax Fraud Cases", dated September 18, 1937, bearing "Commissioner's Mimeograph Collection No. 4653." This mimeograph, your Honor, amended the prior one, and the penciled notations on the Government's exhibit offered prior to this one incorporate the provisions of this mimeograph now being offered.

The Court: Received.

The Clerk: Defendant's D.

(The document referred to was marked Defendant's Exhibit D and was received in evidence.)

Mr. Machtinger: As Defendant's E, I offer as Government's exhibit a document bearing Paragraph No. 9322 from the Internal Revenue Manual dated October 3, 1955. This is entitled "Fraud Cases Initiated In Audit and Collection Divisions

(Testimony of Oren E. Cummins.)

Indications of Fraud Reported to Intelligence Division." [30]

The Court: Received.

The Clerk: Defendant's Exhibit E.

(The document referred to was marked Defendant's Exhibit E and was received in evidence.)

Cross Examination

Q. (By Mr. Lavine): Mr. Cummins, in your various cases in which you have worked on fraud aspects of income tax cases, have you always worked with a special agent before the case was concluded?

A. No, I have not.

Q. Let us say that a case was referred to the regional counsel, or whatever the procedure was in 1927 on. In other words, it was recommended by someone for criminal prosecution.

In those cases which fit that category in which you have taken part, has there been any case in which the recommendation for criminal prosecution has been made by somebody, in which you took part, in which there was not a special agent took part?

A. I don't know of any. That was a matter of procedure. It was necessary a special agent be assigned.

Q. Mr. Cummins, I show you Defendant's Exhibit C, which purports to be a regulation dated January 20, 1936, and I direct your attention to the next to the last paragraph on the bottom of that first page. Will you kindly read that?

(Testimony of Oren E. Cummins.)

A. "Investigations Internal Revenue Agents In Charge——" [31]

Q. You can read it to yourself. I will ask you questions on it in a moment.

A. Oh. (Witness complies.)

I have read it.

Q. The first sentence of the paragraph to which I directed your attention reads as follows:

"If during an income tax investigation an internal revenue agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in charge, who will forward a copy to the Special Agent in charge."

Was that procedure followed by you at all times, let's say, from 1936 on to 1954?

A. I did not fall within that classification. I was an internal revenue agent, fraud group. This applied to field agents, not to persons working fraud cases.

Q. Do I understand there was some other regulation that was applicable to your——

A. I don't know of any other regulation, but the procedure was different. If it was a fraud agent that discovered fraud he didn't go through this procedure. He simply asked for a special agent.

Q. Let's go to the second sentence there:

"If the Internal Revenue Agent in Charge [32] concludes that the findings indicate probable fraud, he will promptly advise the appropriate Special

(Testimony of Oren E. Cummins.)

Agent in Charge of such findings and request his consideration whether the facts are such as to indicate the necessity for a joint investigation."

Was that procedure followed in the cases investigated by you?

A. Not with respect to the fraud group.

Q. What was the procedure followed by you?

A. With respect to this last paragraph you read, instead of the internal revenue agent referring it to the internal revenue agent in charge, the field agent referred matters to the fraud group investigator, who in turn either supervised the investigation under that agent up to the point when a special agent was called, or took it away from the field agent and gave it to one assigned to the fraud group who was familiar with the procedure.

Q. Let's turn over to page 2, if you will. Will you kindly read that first paragraph at the top of page 2?

A. (Witness complies.) I have read it.

Q. That first sentence states:

"During a joint investigation of an income tax fraud case the Internal Revenue Agent will be responsible for the audit features of the case and the development of evidence necessary to sustain the fraud penalty." [33]

Was that the procedure followed by you and those that worked with you? A. Yes.

Q. It was the responsibility, I understanding, that the internal revenue agent, which is you, for the audit features——

(Testimony of Oren E. Cummins.)

A. Not only the audit features. It doesn't confine it to the audit features.

Q. What more were you responsible for, Mr. Cummins?

A. All evidence necessary to support the audit features, which also supports the criminal.

Q. I read you the third sentence of the same paragraph, which reads:

"The Special Agent will be responsible for the criminal feature of the case."

Do I understand that your procedure was different than set forth in this regulation?

A. I wouldn't say that either agent was responsible for criminal liability. All either agent did was to make recommendations. There was no responsibility of the special agent other than to make his recommendations after he wrote his report, and jointly work with the agent, or the agent jointly work with him, whichever way you put it.

Q. In answer to a previous question you stated these regulations were not applicable to your particular fraud group. [34]

A. I said that with respect to the first part of the first paragraph.

Q. That part is not applicable. I have asked you questions as to Paraph 1 on page 2. Are those sentences applicable to the duties of you in your work on the fraud squad? A. Yes.

Q. The only part that you object to then is the first two sentences in the paragraph from the bot-

(Testimony of Oren E. Cummins.)

tom of page 1, which begin, "If during an income tax * * * "? Do I so understand your testimony?

A. The paragraph, "If during an income tax investigation an Internal Revenue Agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in Charge, who will forward a copy to the special Agent in Charge."

That was not the procedure in the group squad.

Q. Could you tell us who set forth the procedure which you should follow as a member of the fraud squad?

A. Internal revenue agent in charge.

Q. The internal revenue agent in charge set forth the procedure you should follow. Was this in writing or orally?

A. I don't know. It came to me through the group supervisor.

Q. The group supervisor told you what to do and you [35] were told to do it in a certain way.

A. I don't know that he told me what to do. We just did that, that is all; that is the way we work it. What the authority is I am not going to argue, because this is what we did.

Q. You testified, Mr. Cummins, that in your opinion you were in a greater danger than that of a special agent that may be assigned to the case. Have you ever been assaulted?

A. No, sir.

Q. In the performance of your duties.

(Testimony of Oren E. Cummins.)

A. No, sir.

Q. Have you known of any other internal revenue agent who has been assaulted, criminally assaulted in the performance of his duties?

A. Neither internal revenue agent nor special agent.

Q. Did you at any time carry a gun in the performance of your duties? A. No, sir.

Q. Were you authorized, permitted to carry a gun in the performance of your duties?

A. I was not prohibited from carrying a gun.

Q. It wasn't part of the paraphernalia you are supposed to carry as an internal revenue agent?

A. No, I was supposed to carry a briefcase and get evidence. [36]

Q. Have you ever been present at any arrest in the performance of your duties? A. No.

Q. Have you been present when any search warrants were served in the performance of your duties?

A. That is the duty of the Collector of Internal Revenue.

Q. You have not been present when such were served? A. Yes, I have.

Q. You have? A. Yes.

Q. Who were they served by?

A. Deputy Collector.

Q. Deputy Collector of Internal Revenue?

A. Deputy Collector.

The Court: Have you ever acted as guard for a witness or anything of that kind?

(Testimony of Oren E. Cummins.)

The Witness: No. I acted as a guard for Japanese property, but not as a witness.

Q. (By Mr. Lavine): Have you ever been present when any structure was broken into by officers of the law in the performance of your duties?

A. No, sir.

Q. Have you been present when structures were entered subject to a search warrant? [37]

A. Yes.

Q. What type of case was that?

A. Jeopardy assessments.

Q. Jeopardy claims?

A. Jeopardy assessments.

The Court: I was assuming that your question was simply unfortunate, because federal agents don't go around breaking into places. They search with search warrants and proceed according to the Constitution.

Q. (By Mr. Lavine): Until the development of a fraud case in which there has been a recommendation made for criminal prosecution, is not part of the processing of the case done by the regional counsel's office of the Internal Revenue Service?

A. Well, after the report of the internal revenue agent and the special agent, I believe the report goes to that—to the regional counsel.

Q. In the conduct of your cases, have you ever known an instance in which the regional offices or members of the regional counsel's office have taken part by interviewing witnesses?

A. Yes.

(Testimony of Oren E. Cummins.)

Q. By examining documentary and other evidence that is necessary for the development of the case? A. Yes.

Q. Now, let's suppose a case has gotten over [38] into the hands of the U. S. Attorney and his assistants. Have you ever known a case in which you were involved in which the United States Attorney or an Assistant United States Attorney has gone out and interviewed witnesses in the development of a case?

A. No, I haven't. They usually call on either the special agent or the revenue agent to do the footwork.

Q. Have you ever heard of a case in which the U. S. Attorney or Assistant U. S. Attorney has gone out and interviewed witnesses or examined documentary evidence? A. No.

Q. Have you ever had occasion to shadow a suspect, a person who was suspected of violating one of the internal revenue laws?

Q. What type of case was that?

Mr. Mortenson: I don't think this witness knows what the word "shadow" means; at least I don't. I object to the form of the question.

The Court: You mean he is not familiar with the words common to the art or the vocation?

The Witness: I understand the meaning of the word "surveillance".

The Court: Let's use the loftier language, counsel.

Q. (By Mr. Lavine): Have you ever taken part in the surveillance of a person or witness suspected of criminal activity? [39]

(Testimony of Oren E. Cummins.)

A. I have, but not with anyone else.

Q. Would you explain the circumstances in which that act occurred?

A. The taxpayer evaded me. I left word at his office a number of times to leave his books for my examination, and he would not. He would not see me. I knew he was giving a lecture at a certain place on a certain hour, at a certain auditorium. I went out there at 9:00 o'clock at night and waited for him, to serve a summons.

The Court: Waited for him to serve a summons?

The Witness: Waited for him, to serve a summons on him, and I caught him.

Q. (By Mr. Lavine): Other than that one instance, have you ever had occasion to use surveillance on a suspect?

A. No, that is the only time.

The Court: Well, have you known of persons holding the same rank as yourself being engaged in the work of surveillance of suspects or witnesses?

The Witness: Yes.

Q. (By Mr. Lavine): Would you describe the circumstances?

A. I wouldn't know the circumstances, only from hearsay.

Q. Isn't that the job of the special agent, to go out and pick up—I should say exercise surveillance over criminal suspects?

A. I think that is the job of the Bureau of [40] Investigation, not the special agent.

(Testimony of Oren E. Cummins.)

Q. Do I understand your answer is that the Federal Bureau of Investigation has any jurisdiction over crimes against the Internal Revenue Code?

A. You didn't say of the Internal Revenue Code——

Q. I will limit my question to that. If so, would your answer to my question be any different?

Mr. Mortenson: Would you mind reading that question?

Mr. Lavine: The only thing—I will reframe the question in the interest of simplicity.

Q. (By Mr. Lavine): Other than the instance which you have quoted, have you ever known of any other internal revenue agent who has exercised surveillance upon any person suspected of violation of the internal revenue laws?

A. Yes, I have.

Q. Would you describe that?

A. It happened—I think of another case I did——

Q. Will you describe——

A. ——in conjunction with a special agent.

Q. What were the circumstances?

A. Working on a case down in New Orleans, Governor of Louisiana, there were about 20 agents and 20 special agents and the Governor had about 30 gum shoes out watching us, and we made it part of our business to watch them.

The Court: What is a "gum shoe"? [41]

The Witness: Detectives.

(Testimony of Oren E. Cummins.)

Q. (By Mr. Lavine): Isn't it a fact, Mr. Cummins, in the investigation of an income tax evasion case, that the principal part of your duties consist in, A, auditing of books; B, verification of various supporting documents, such as bank vouchers, statements, other items which would verify the entries in the taxpayer's books, and all other documentary evidence you can find? Is that not a fact?

A. Well, this other documentary evidence that I might find, what limit do you put on that, if any?

Q. I asked—I used the word in its broadest sense, documentary evidence of all kinds.

A. That was our duty, yes.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Cummins, during your tenure as an internal revenue agent on how many occasions did the special agent, who was in the joint investigation, carry firearms?

A. I never knew of a special agent carrying firearms on duty.

Q. Did you have anything to do with firearms when you were an internal revenue agent?

A. No. I used to go down in the basement of the Federal Building and practice revolver shooting, the same as the [42] special agents did.

Q. In the basement of this building?

A. Yes.

Q. You practiced pistol shooting, is that correct?

A. Yes.

(Testimony of Oren E. Cummins.)

Q. You do know how to shoot a gun, don't you, Mr. Cummins? A. Yes, I do; I have one.

Q. With regard to the criminal and the non-criminal features of a tax case, what ordinarily is used to prove the element of criminal intent?

A. The accounting features are the principal evidence in most cases, either net worth or an analysis of the books and other evidence to support it.

Q. Have you been in cases where a criminal intent was proved primarily by documentary evidence? A. Yes.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

(Witness excused.)

Mr. Mortenson: Plaintiff rests.

Mr. Lavine: As Defendant's next in order I would like to introduce the "Tasks and Performance Requirements Statement" for Grades 11, 12 and 13 of an internal revenue agent of the Audit Division. [43]

The Court: Received.

The Clerk: Defendant's F.

(The document referred to was marked Defendant's Exhibit F and was received in evidence.)

Mr. Lavine: I will call Mr. Vincent Murphy.

The Court: How long do you expect to be?

Mr. Lavine: About five minutes.

The Court: All right.

VINCENT B. MURPHY

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Vincent B. Murphy.

Direct Examination

Q. (By Mr. Lavine): Mr. Murphy, what is your occupation or profession?

A. I am an internal revenue agent, supervising a group.

Q. Does your group have any special title, popular title?

A. It is Group No. 7 of fraud investigations only.

Q. For how long have you been supervisor of this fraud group?

A. Since November 2, 1949.

Q. In the work of the fraud group of which you are the supervisor, if during a tax investigation an internal revenue [44] agent should find what he believes to be indications of fraud, what is then supposed to be done, according to regulations?

A. In this division, where we have a special fraud group, the regular agent in the field might find fraud and he would submit an information report to the fraud group and we would try to develop it further before we would call in the special agent for joint investigation.

Q. Supposing a fraud case has developed within your group, what does the internal revenue agent

(Testimony of Vincent B. Murphy.)

assigned to your group do once he has found what he definitely suspects to be fraud?

A. He will request cooperation of the special agents.

Q. Do I understand that until that is acted upon favorably or unfavorably he will suspend his activities?

A. Those are his orders.

Mr. Lavine: No further questions.

Cross Examination

Q. (By Mr. Mortenson): Mr. Murphy, do you happen to know when this particular set of instructions marked Defendant's Exhibit F went into effect, approximately the time?

A. Well, this is the test and performance requirements for the regular field audit group. I think it has been in effect, oh, for a number of years, although it has just been [45] recently put on the new form.

Q. It seems to bear a date of '54 at the bottom of the page. Does that mean this particular one was printed up in 1954?

A. That is right. But in addition to this, the fraud agents have further tests and performance requirements.

Q. Was it your understanding, Mr. Murphy, that the general instructions to internal revenue agents with respect to fraud cases were to be modified to the extent it was necessary for you to operate your fraud group in Los Angeles—I am re-

(Testimony of Vincent B. Murphy.)

ferring specifically to this statement on Defendant's Exhibit C:

"If during an income tax investigation an Internal Revenue Agent finds what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Internal Revenue Agent in Charge, who will forward a copy to the Special Agent in Charge."

Was that procedure in Los Angeles during the time that you were group supervisor of the fraud squad? A. Yes, sir, it was.

Q. I thought that you had stated that the revenue agent made a report to you as group supervisor. Was that through the internal revenue agent in charge? A. That is right. [46]

Q. So that what this really means is the report was made to the internal revenue agent in charge to assign the matter to you, is that correct?

A. That is right. We made a further preliminary investigation to see whether we should call in the special agent.

Mr. Mortenson: That is all.

Mr. Lavine: No further questions.

(Witness excused.)

Mr. Lavine: Defendant rests.

The Court: Anything further from the plaintiff?

Mr. Mortenson: Not unless you have some further questions. I would like to present as much of my oral argument today as would help enlighten the court.

The Court: The court would like to become acquainted with a considerable mass of exhibits. I take it ~~one~~ is the administrative file, isn't it?

Mr. Mortenson: Yes, your Honor.

The Court: Before hearing the oral argument, that is, I ought to know the evidence before I hear the argument. Don't you think that would be a prudent procedure?

Mr. Mortenson: Are you going to set a date then for further——

The Court: Yes, it has come in so fast and I haven't had an opportunity to keep current on it. The trial commenced at 1:30 and you have put in quite a bit here, and I take it, [47] from the looks of it, there are at least several dozen pages and I think the court should be entirely familiar with those before hearing the argument. I know your lawsuit involves but a few dollars in this present suit. But it might become *res judicata* so as to affect a great deal of future payments to the plaintiff. I think it would be prudent to put the case over for argument until the court has had opportunity to read these exhibits.

Mr. Mortenson: I think the court may take judicial notice of the fact that in 1956 an amendment to the Retirement Act was passed, which now provides for retirement at two per cent for regular internal revenue agents.

The Court: Then you really are fighting over the seven hundred some-odd dollars.

Mr. Mortenson: As applied to less than a hundred, perhaps less than fifty.

The Court: As applied to this plaintiff.

Mr. Mortenson: It is a very small amount, so far as the Government is concerned. It is very big as far as he is concerned, your Honor.

What I was trying to say was that if he had not retired until now he would get this same two per cent that is in issue at this time.

The Court: Still don't you think that it would be prudent, considering the somewhat vague status of the legal [48] questions here, if the court were fully informed as to the contents of the exhibits before undertaking to follow your argument upon it?

Mr. Mortenson: Yes. I would like to come back for oral argument at any time which you would care to set now or on notice.

Mr. Lavine: That is quite agreeable.

Mr. Machtinger: In connection with Mr. Mortenson's statement about the amendment to the Retirement Act, the important point I think your Honor is putting his finger on is that this case may be res judicata to those other employees permitted to retire at age 50.

The Court: It couldn't be, they are not parties to the suit. It would be res judicata as to this plaintiff's rights concerning future payments. We have jurisdiction here, as I understand it, to only determine what is due up to the time of the filing of the complaint, and if I make a determination of what formula is to be used, I think that would be res judicata as to all payments thereafter to be made to this plaintiff.

Mr. Mortenson: I feel sure that the general accounting office would act upon your judgment and would pay in accordance with it in the future.

The Court: They haven't always done so.

Mr. Mortenson: We wouldn't have to bring a number of [49] suits.

The Court: Well, how long should we wait here before having the oral argument? The evidence, the oral evidence heard today will not be difficult for the court to retain in memory, because it has simply recited, in the specific instance of Mr. Cummins, what has been known to those in this type of government work to be true as to many employees of his class. So I will not have difficulty in retaining a present recollection of the oral testimony. But I would like time to read these various documents.

How long do you think I should have, bearing in mind I do not read them after 10:00 o'clock in the evening?

Mr. Mortenson: I much prefer to have you read these in the fresh part of the morning, your Honor. I can come back any time it suits your convenience.

The Court: When is that other case involving this point going to be tried?

Mr. Lavine: October 30th, your Honor, next Tuesday.

Mr. Mortenson: I think that Judge Yankwich, with his administrative duties as well as the trial of cases, would appreciate your contribution to this particular problem, your Honor.

The Court: I think that it would probably be

better if we had the senior judge's expression first. They don't do that in the appellate courts. They make the youngest one [50] speak out first. But here I think we will let the senior judge decide his case first, and perhaps we can pick up some wisdom from his remarks.

Suppose we argue this case on the 9th of November? Is that all right? It is a Friday.

Mr. Mortenson: Yes, that is agreeable to the plaintiff.

Mr. Lavine: Yes.

The Court: 10:00 o'clock. November 9th at 10:00 o'clock. We will not expect any briefing. If you wish to put in a brief, either of you, it will be read.

Mr. Mortenson: If it is just a matter of the money judgment, then I don't think I will submit any further brief on the matter.

The Court: What bothers me actually is the jurisdiction of the court to render any kind of a judgment here, other than dismissal for want of jurisdiction. It seems to me, just on the first reading of the law, that the jurisdiction here is in the Civil Service Commission and not in the District Court.

Mr. Mortenson: Well, I think that reading of the Dismuke and Anderson cases will dispel any doubt in your mind. Those cases have been cited dozens of times with approval.

The Court: The unfortunate thing about my coming to the bench not prepared on that today is that your brief didn't reach me until Saturday morning. I have not had an opportunity [51] to

read the cases cited therein. I have read the brief, but not the cases.

Mr. Mortenson: Mr. Lavine, I believe, was in Fresno the early part of last week, when I was ready to discuss the matter with him. I felt that I should go over it with him before I filed my brief. When he got back I just had time to get the brief ready and get it filed.

The Court: It is just one of those things that necessitates our putting the case over a little further. I want to read those cases, as well as the exhibits, before coming to a decision.

The case is continued to the 9th of November at 10:00 o'clock for argument, with an option to either of you to provide any further reading matter which you feel might be of assistance to the court.

(Whereupon, at 3:15 o'clock p.m., Monday, October 22, 1956, an adjournment was taken to Friday, November 9, 1956, at 10:00 o'clock a.m.) [52]

[Endorsed]: Filed May 2, 1958.

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

DEPOSITION OF PARIS B. CLAYPOOLE

taken on behalf of the plaintiff, at Room 625, Federal Building, Los Angeles, California, commencing at 4:00 o'clock p.m. Wednesday, October 10, 1956, before Charles C. Jenkins, CSR, Notary Public, pursuant to the annexed Stipulation.

Appearances of Counsel: For the Plaintiff: Ernest R. Mortenson, Esq. For the Defendant: Laughlin E. Waters, United States Attorney, Max E. Deutz, Assistant United States Attorney, Chief of Civil Division, by Richard A. Lavine, Assistant U. S. Attorney, and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

PARIS B. CLAYPOOLE

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): State your name, please. A. Paris B. Claypoole.

Q. What is your present business address?

A. Suite 709 Rowan Building, 458 South Spring Street, Los Angeles.

Q. What is your business or occupation?

A. I am presently engaged in income tax practice, income tax consultant.

Mr. Machtinger: We will stipulate he is the

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

same Mr. Claypoole that testified in the Gibney case, and his functions and duties were the same, he would now testify they were the same as he testified in the Gibney deposition.

Mr. Mortenson: So stipulated.

Mr. Lavine: So stipulated.

Q. (By Mr. Mortenson): Were you formerly an Internal Revenue Agent? A. Yes, sir.

Q. And are you retired from the Service, the Internal Revenue Service?

A. Yes, I retired on December 31, 1953. [2]

Q. What was your official position on the day of your retirement?

A. Internal Revenue Agent.

Q. Were you at that time a Group Supervisor?

A. No, sir.

Q. Had you been a Group Supervisor in Los Angeles prior to your retirement?

A. Yes, sir.

Q. When were you first assigned to the Los Angeles office of the Bureau of Internal Revenue, Mr. Claypoole? A. About August 4, 1930.

Q. Later were you made a Group Supervisor?

A. Yes, sir.

Q. And what year was that?

A. March 17, 1941 to September 30, 1949.

Q. During the time you were an Internal Revenue Agent and Group Supervisor, was Oren E. Cummins an Internal Revenue Agent in that group, which was the Fraud Group? A. He was.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. Do you know when Mr. Cummins became a member of the Fraud Group?

A. No. Mr. Cummins was a member of the Group when I arrived in Los Angeles. He was assigned to it.

Q. So that you know he was a member of that group from 1930 until the time you left, is that correct? [3] A. Yes, sir.

Q. During the time you were an Internal Revenue Agent in the Fraud Group, were you generally familiar with the type of work performed by Mr. Cummins? A. I was.

Q. Were you generally familiar with the cases on which he worked? A. I was.

Q. What proportion of the cases assigned to Mr. Cummins involved persons suspected of criminal evasion of tax?

A. It was my recollection that all of them were.

Q. I show you a list of names which appear under certain dates, which I believe is a copy of an exhibit in the Civil Service file. Would you identify that, Mr. Lavine?

Mr. Lavine: That appears to be the same list, Mr. Mortenson.

Mr. Machtinger: That is Exhibit B in the Civil Service file.

Mr. Lavine: In the Cummins file it is Exhibit D.

Q. (By Mr. Mortenson): After examining that list of names, Mr. Claypoole, do you recognize and do you recall any of the individuals listed there?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. Yes. Most of them are quite familiar to me, and I recall almost all of them. [4]

Q. Were any of the individuals named classified in what was known as the "racketeer" category?

A. Yes, sir.

Q. Would you say there were quite a number which would be so classified?

A. Yes, I would say so.

Q. To your knowledge, was Mr. Cummins assigned to cases which required him to have personal contact with individuals who were known to be hoodlums or questionable characters?

A. Yes, sir.

Q. During the period from 1930 until you left the Fraud Group, what proportion of Mr. Cummins' time was involved in the investigation of individuals suspected of criminal fraud?

A. It is my recollection that all of that time was devoted to such investigations.

Q. Mr. Claypoole, you have previously testified in a similar matter involving a retirement case on the part of Internal Revenue Agent L. W. Gibney. Would your answers regarding the functions and duties of Revenue Agents and Special Agents be the same or different?

A. My answers to those questions would be the same.

Mr. Mortenson: May it be stipulated, Mr. U. S. Attorney, that the questions and answers in the case of Gibney versus United States, Civil Action

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

No. 19867-Y, be [5] made a part of this deposition, insofar as they relate to Mr. Cummins' case, the testimony of Mr. Claypoole, and that such questions and answers be copied physically into this deposition by the reporter?

Mr. Lavine: It may be so stipulated that the entire testimony, both direct, cross, redirect, recross, and so forth, may be so handled.

Mr. Mortenson: Very well. I have one further question.

Q. With regard to the cases investigated by Mr. Cummins, were Special Agents assigned to work jointly with him in most or all of the cases?

A. I would say in most of them.

Q. Will you explain generally the functions of a Revenue Agent and of the Special Agents when they are conducting a joint investigation in a criminal fraud case?

A. The function of the Revenue Agent was to establish a correct income tax liability of the taxpayer, to determine if there was a fraud involved in the case; if he had established sufficient indication of fraud, he thereupon would request the cooperation of a Special Agent. After the Special Agent was assigned to the case the Agents worked jointly, the Revenue Agent completing his investigation and preparing a report of his findings and his recommendations, and thereafter the report was submitted to the Special Agent and the Special Agent prepared his report and made his recommendations

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

concerning the matter of fraud or otherwise. [6]

Q. During the conduct of a joint investigation for criminal income tax fraud, did the Special Agent have authority to order the Revenue Agent to perform any particular act?

A. I would say that he had not.

Q. Who was the immediate supervisor of the Revenue Agent regularly assigned to such a joint investigation?

A. A Revenue Agents' Group Supervisor.

Q. Who was the immediate supervisor of the Special Agent who was assigned to a joint investigation?

A. The Group Supervisor of the Special Agent.

Q. Under the rules and regulations, did the Special Agent assigned to a joint investigation have any disciplinary powers over the Revenue Agent who was assigned to that same case?

A. None whatever.

Q. After a Special Agent had been assigned in a criminal fraud case, normally what was the function of the Revenue Agent in that case?

A. The normal function of the Revenue Agent was to complete his technical examination of the tax liability, make his report, and to cooperate with the Special Agent on all of his assignments in connection with the case.

Q. In actual practice, Mr. Claypoole, can you say that there would be a division of duties that

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

would relate to criminal features of a case, as distinguished from [7] non-criminal features?

A. I have never so construed it.

Q. When reference is made to the instructions which state that the Special Agent is responsible for the criminal features of a fraud investigation, what do you interpret that to mean?

A. I have always interpreted that to mean that he was responsible for assembling in his report all evidence as to criminal liability, and that his report contained recommendations concerning that liability.

Q. How many years of experience did you have in fraud investigations as an Internal Revenue Agent and Group Supervisor?

A. My first fraud investigation was made sometime in the year 1921, and continued without interruption until September of 1949, and from September 1949 until December 31, 1953 I devoted some time to fraud investigations.

Q. From your long experience in this field, Mr. Claypoole, as between a Revenue Agent and the Special Agent, which one is more likely to spend time with the taxpayer, his associates and his employees, where there is a joint investigation for criminal fraud?

A. The Revenue Agent.

Q. In the ordinary criminal fraud case, from your experience would you say that the Revenue Agent would be most likely to be the first to talk to the taxpayer, or [8] would it be the Special Agent?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. My experience has been that it is almost invariably the Revenue Agent has made the first contacts with the taxpayer and his representatives.

Q. During the time that you investigated fraud as an Internal Revenue Agent, or during the period when you were a Group Supervisor, did you learn of threats or acts of violence against Internal Revenue Agents? A. None whatever.

Q. From your experience in the criminal fraud field, Mr. Claypoole, would you say that Revenue Agents, as compared with Special Agents, were exposed to more danger, the same danger, or less danger?

A. I would say more danger; and qualify it to this extent, that the Revenue Agent spent more time with the taxpayer and his representatives, and for that reason only would there be more danger. In no circumstance that I can recall would there be less danger.

Q. Mr. Claypoole, assuming that a taxpayer kept a double set of books, one of which contained figures corresponding with those on the tax return, and another set which accurately reflected his gross and net income, which was higher than the amount reflected in the return, as between the Revenue Agent and the Special Agent, who would examine those books, audit them, and report on them?

A. The Revenue Agent.

Q. And in your experience, in such a type of case, [9] who would be the witness for the Govern-

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

ment in testifying concerning the contents of the books, and such interpretations as might be derived from the circumstances?

A. The Revenue Agent.

Mr. Machtinger: May I ask if you would read the latter part of his question again? "Contents of the books" and what else?

(The question was read.)

Q. (By Mr. Mortenson): In your experience in the investigation of fraud cases, Mr. Claypoole, and their prosecution in the Federal District Court, can you state whether more Revenue Agents or fewer Revenue Agents, as compared to Special Agents, were witnesses for the Government?

A. Well, I would say that in my experience, the Revenue Agents were almost universally the Government's witnesses, and would carry the burden of prosecution which resulted from the investigation.

Q. When an expert witness was called for computation of tax to verify the allegations in the indictment, would a Revenue Agent be called as a witness, or a Special Agent?

A. A Revenue Agent would be called.

Q. In your experience in fraud prosecutions, were there any cases of prosecution for tax evasion where a Special Agent conducted the investigation without the cooperation of a Revenue Agent or a Deputy Collector? [10]

A. None whatever.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. What, during the time you were an Internal Revenue Agent and Group Supervisor, was used as Exhibit 1 to the Special Agent's report which went forward with the recommendation for prosecution? A. The Revenue Agent's report.

Q. And briefly, Mr. Claypoole, will you tell us what that Revenue Agent's report ordinarily contained?

A. The Revenue Agent's report contained all of the data necessary to establish the tax liability of the taxpayer, and all other information pertinent to the establishment of fraud and/or criminal prosecution.

Q. Can you state who made the computations which went into the tax deficiency figures that appeared in the indictments?

A. The Revenue Agent.

Q. Do you recall when the Intelligence Unit first became a part of the Treasury Department?

A. It is my recollection that it was sometime in 1919, just about the time I entered the Internal Revenue Service.

Q. Prior to the time that the Intelligence Unit was organized, were investigations of tax evasion conducted and were prosecutions had?

A. Yes.

Q. I understand you to say, then, that investigations and prosecutions for tax evasion preceded the time when there were Special Agents?

A. I would have to qualify it to this extent, that it is my recollection that there was. Now, it

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

may have happened immediately after they created the Intelligence Unit. It is my recollection now that it had occurred prior to the formation of the Intelligence Service.

Mr. Mortenson: That is all. Any cross-examination?

Mr. Lavine: Yes.

Cross Examination

Q. (By Mr. Lavine): Mr. Claypoole, as I understand it, in the investigation of a criminal fraud case there are normally two elements in the case, both factually and legally. Those are, (1) the auditing feature, whether there is a tax due or not; and (2) whether there is any criminal intent. Is that a correct summary of the elements of a criminal tax case? A. That is right.

Q. Now, directing our attention to the first element, the audit feature—is there a tax due?—whose responsibility was it primarily to establish that in a joint investigation?

A. The Internal Revenue Agent.

Q. Now, turning our attention to the second element, [12] that of the criminal intent, whose responsibility was it primarily to develop that feature of the investigation?

A. Well, that was joint, although the question of what is criminal and what is not criminal is always a matter of the greatest concern to all parties, and the mimeographed instructions in recent years provided that that was the Special Agent's option.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. In this connection, I would like to read to you Section 4566.1 (1) of the Internal Revenue Manual, which was in effect at the time that Mr. Cummins retired and applied for retirement under the provisions of the law upon which this case is based, which reads as follows, and I quote:

“Responsibility in all full-scale investigations for the development of evidence and for recommendations pertaining to the potential criminal features of the case and the ad volorem additions to the tax for civil fraud, negligence or delinquency (excepting those concerning the tax estimations) shall be that of the Special Agent unless and until he withdraws from the case. He will be responsible for the method of procedure and conduct of the investigation. The cooperating officer will be responsible for the audit features of the case. The [13] Internal Revenue Agent will also be responsible for taking any action necessary to protect the interests of the Government in respect to the statutory period for assessment.”

Now, having read to you that regulation, does that represent during the period of years related to, the division of responsibility between the Internal Revenue Agent and the Special Agent in the conduct of a joint investigation?

A. I am quite familiar with the matter that you have just read. It was a matter of continuous discussion throughout the years whose responsibility was it to do this or that or the other thing. The

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

Revenue Agent was very often—and in a number of cases, the case was completed before a Special Agent was in the case, all of the evidence was established. Now, that was true in cases that other men with whom I had worked engaged in. So it was not a clearly defined area. There was always a hazy grey area as to where one man stopped and the other man took over.

Q. Do I understand that you say this was a controversial point which in some cases the Internal Revenue Agent almost completed, or in your words, completed his investigation before the Special Agent came in, and finally through the hazziness and confusion and mild controversy the matter was determined and delineated by an appropriate [14] regulation?

A. No. That is restating old regulations. You see, originally it started out that there were no regulations at all, and the Revenue Agent originally presented his case upon direction of the Commissioner to the United States Attorney. Then the next step was they established an organization in Washington in the Chief Counsel's office in the Joint Division to review those matters, and then the Special Agent's case, and both reports were examined; and throughout the years there has been a change in those regulations and procedures; and there always has been, and it may be to this day, so far as I know, still some area that is not clearly defined, because as was pointed out at the beginning,

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the Revenue Agent when he makes his investigation, he has to first determine whether there is evidence of fraud. Now then, when he is determining evidence of fraud, frequently he has to establish all of the facts necessary for prosecution, and that is why the Revenue Agent has done his work, and then the Special Agent is called in merely as a procedural matter in many cases—and this happened many, many times—because of the matter of processing his report and the Revenue Agent's report.

Q. Does this regulation then pretty much embody the principles upon which the earlier regulations and procedures were based?

A. Well, there are modifications that I at this [15] moment couldn't specify, wherein they are; but it has been out of this area of disagreement for years. It has been straightened out where there was no conflict between the two branches, because frequently it was quite customary for the Revenue Agent to carry the burden of the case from the beginning right down until the jury brought in a conviction or the equivalent. That has happened many, many times throughout the years.

Q. Now, let us take a typical case by way of example, say investigating Mr. Smith. Let us say for example there is nothing special about Mr. Smith, he owns just a factory down the road, and the Internal Revenue Agent, Field Division, or whatever you call it, is performing some work, and he audits the books for a period of two or three

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

years, whatever the case might be. Upon the compilation of all his figures, he finds or suspects that there is fraud. What does he do at that point?

A. Are you speaking of presently, or what happened——

Q. Well, let us take a period prior to 1947.

A. Well, in that period—and that was during the period when I had the group over there—this is what happened: If that situation developed in any group outside of my group, when the case was assigned to me I looked into it, I sized up the Agent to find out how well qualified he was, and if he was well qualified he was automatically shifted over to my group or supervision, during which time [16] I supervised his work on that case, carried it on to such time as I believed it was concluded, and if necessary we called in a Special Agent.

Now, if it happened in my own group, as we did have those things happen, the Agent would carry right on up to the point where we decided, "Well, this is the time we have to call in a Special Agent; there is evidence of fraud here, here are the facts that we have developed here," and so forth. Then we would call in a Special Agent.

Q. And from that point on what would the Special Agent do in that investigation?

A. Well, to be brutally frank, and to say something I don't like to say, in many cases nothing but

Plaintiff's Exhibi No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the Revenue Agent when he makes his investigation, he has to first determine whether there is evidence of fraud. Now then, when he is determining evidence of fraud, frequently he has to establish all of the facts necessary for prosecution, and that is why the Revenue Agent has done his work, and then the Special Agent is called in merely as a procedural matter in many cases—and this happened many, many times—because of the matter of processing his report and the Revenue Agent's report.

Q. Does this regulation then pretty much embody the principles upon which the earlier regulations and procedures were based?

A. Well, there are modifications that I at this [15] moment couldn't specify, wherein they are; but it has been out of this area of disagreement for years. It has been straitened out where there was no conflict between the two branches, because frequently it was quite customary for the Revenue Agent to carry the burden of the case from beginning right down until the jury brought conviction or the equivalent. That has happened many, many times throughout the years.

Q. Now, let us take a typical example, say investigating Mr. Smith, for example there is Mr. Smith, he owns just a small business, the Internal Revenue Agent, whatever you call him, he audits the

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Caypoole.)

years, whatever the case might be. Upon the compilation of all his figures, he finds or suspects that there is fraud. What does he do at that point?

A. Are you speaking of presently, or what happened——

Q. Well, let us take a period prior to 1947.

A. Well, in that period—and that was during the period when I had the group over there—this is what happened: If the situation developed in any group outside of my group, when the case was assigned to me I looked into it, I sized up the Agent to find out how well qualified he was, and if he was well qualified he was automatically shifted over to my group of supervision, during which time [I] supervised the work on that case, carried it through such [] I believed it was concluded [] if [] we called in a Special Agent []

how [] my own group, as we did this [] the Agent would carry [] there was decided, "Well, [] t call [] Special Agent; [] branch [] are the facts [] pped [] so forth. Then [] Spec[]

that [] what would the Special Agent []

think, and to say something [] many cases nothing but

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

take the Revenue Agent's report and paraphrase it and make his recommendations.

Q. Would it be the responsibility of that Special Agent to go out and further develop the element of intent, or any other criminal elements that were missing so far in the investigation?

A. If there was anything missing, yes; but frequently it happened, and it happened quite often, there was nothing missing in the cases, and that happened very frequently. It is something that I would prefer not to say about my friends in the Intelligence Unit, but it was a fact.

Q. Now, let us take a similar situation. We have Mr. Joe Jones down the street, who is suspected of being a [17] bookmaker, and a member of your squad is designated to audit his returns for the last three-year period prior to 1947. What happens in that situation?

A. In that case the Agent would proceed with his investigation, and to reach that point in the investigation where we believed that there was sufficient evidence to justify the request for the cooperation of a Special Agent. And sometimes actually in a case like that we would find no evidence of fraud. He might be suspected of being a bookie, and we found no evidence of it, and we closed the case there, and no Special Agent ever appeared in the case.

Q. And during this period of time in which you were working on the case, in the meantime is he

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

supposed to go to the taxpayer and tell the taxpayer fraud is suspected?

A. I didn't quite follow you.

Q. During the period of time at which your Internal Revenue Agent is working on the case of Joe Jones, bookie, is it part of his responsibility, or does he customarily go to the taxpayer and tell him, "You are suspected of fraud, and I am working on that"?

A. Oh, no, no. No, the Agents never tell a taxpayer that they suspect him of fraud, because there may not be any suspicion of fraud. There may be just suspicion, and there may not be any fraud there.

Q. So before the taxpayer is told, there must be something more than a suspicion? [18]

A. Yes.

Q. There must be a case actively in process, is that correct?

A. Yes. The matter of telling a taxpayer whether there is fraud, they usually don't learn that now until they are just down here ready to present it to the Grand Jury. That is one of the other grey areas. The taxpayer is most anxious to find out when the Government thinks there is fraud in the case, and they can't find out.

Q. At any time during the investigation by the Internal Revenue Agent is the taxpayer warned of his Constitutional rights that anything he may say

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

may be held against him, or his right to consult counsel, and the like?

A. Oh, yes, yes. That has been a practice universally followed, and I followed it. I think most of the men in my Group did; they cautioned them as to their rights, and they were certainly instructed to, because that was one of the situations that might make or break a case, on that very point.

Q. At what point would the taxpayer be so warned?

A. That is something that would depend on a particular case. I have done it immediately, and I have done it sometimes quite a bit later. You have to wait for an appropriate circumstance to do that. The Agent does not go in to a taxpayer and say, "I warn you of your rights, I am going to use it against you." No, he can't do that. [19]

Q. Would the taxpayer be informed that the man working on his books was a member of the so-called Fraud Group?

A. They were most anxious, and the tax counsel in a city like Los Angeles were most anxious to find out what Group the man was in, and if he was in Claypoole's Group, the Fraud Group, the tax counsel became very active immediately.

Q. But as a matter of fact, until a Special Agent entered the picture, the taxpayer would not necessarily know that there was a fraud case actually against him?

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

A. He does not know it even when the Special Agent is in the picture.

Q. You testified you have not known of an instance in which an Internal Revenue Agent has actually been threatened or has met with physical violence from the taxpayer. Were any other members of your Group authorized to carry firearms?

A. No.

Q. Didn't they carry firearms as part of their duty? A. No.

Q. Was it the responsibility of your Group to present matters to the United States Attorney for prosecution?

A. Actually it was a matter of rightful practice, the United States Attorney or a United States Attorney sought our agents to present cases to the Grand Jury, and [20] usually—Now, there are always of course exceptions, but I would say in my experience that usually the Revenue Agent presented the evidence, and I have appeared before Grand Juries from one end of this country to the other throughout the years, and in only two or three cases that I can recall now did a Special Agent appear, but the Revenue Agent that has done the work has to testify at first hand on the facts. That is the experience that we have.

Q. But the initial reporting to the United States Attorney that a crime has been committed or was suspected of being committed, was that a part of the duty of your group?

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

A. No. That is a procedural matter. It is not the Special Agent's business either. That is a special matter that goes to the Attorney General of the United States, where they take all these reports, the Special Agent's report and Revenue Agent's report; it goes to Washington and ultimately it ends in the Attorney General's office in Washington. The first procedure that I testified about was that in which the Commissioner wrote a letter authorizing and directed to the Revenue Agent to present the case to the United States Attorney.

Q. To what year are you referring?

A. That was back in the very early part.

Q. Will you take it chronologically, so we can get what the changes were? [21]

A. Yes, I will be glad to. That was in the early 20's. Then there was set up in Washington in the Chief Counsel's office a division, the title of which—I don't remember—the Penal Division, who were engaged on reviewing reports of the Special Agents and Revenue Agents. There was also set up a Special Adjustment Section in the Internal Revenue Bureau in Washington, this Special Adjustment Section, whose duty it was to examine and review carefully the technical details of all fraud cases. If the taxpayer requested it, or his counsel, conferences were held in Washington with the Penal Division and the Special Adjustment Section, whose duty it was to examine and review carefully the technical details of all fraud cases. If the taxpayer

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

requested it, or his counsel, conferences were held in Washington with the Penal Division and the Special Adjustment Division for hearing, and if the case was then found to be one where prosecution should be had, it was referred to the Attorney General, who in turn sent it to the United States Attorney in the particular district, and it was then presented to the Grand Jury. At that time it was the usual practice, at least in my experience, to call Claypoole as a witness to appear before the Grand Jury; and as I say, through the years there were only two or three experiences of my own in which Special Agents appeared.

Q. This was only up to 1947 or 1946?

A. This is through 1949.

Q. Through 1949? [22]

A. Well, now—oh, pardon me. I spoke out of turn. They set up about 1946—they decentralized this Washington arrangement and established here in San Francisco an office where the cases went there, where before they went to Washington. The purpose there was to do the work closer to home, because Washington was so far away for most people.

Q. Are you acquainted with instances in which the United States Attorney or Assistant United States Attorney has actually performed investigating work on a particular case, Mr. Claypoole?

A. Well, I have spent much time with Assistant United States Attorneys in these cases in one part

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

of the country and another, and I have never yet known of them to do any investigating work.

Q. Would your answer be any different if I were to tell you that I in a particular tax case have made numerous trips, in one case to another State, in order to develop and talk to witnesses and find documentary evidence?

A. I would commend you very highly for your industry.

Q. Are you acquainted with the action Mr. Cummins has brought in this case, Mr. Claypoole?

A. Only in a very vague way.

Q. I will state, before asking you the next question, that it is an action for a certain sum of money to him for declaratory relief, brought by Mr. Cummins against the United States, on the basis that the Department of the [23] Treasury and the Civil Service Commission have wrongfully denied him his rights to retirement under a certain statute known as 691B, Title V. Are you acquainted with that statute?

A. I have never read it. I have never even taken the time to look at it.

Q. In your opinion, does the outcome of Mr. Cummins' case have any bearing at all upon any retirement rights which you might have or claim against the United States?

A. It may have. I personally have no intention of doing anything about it, I am not interested in it. I put in many years in the Service, and I re-

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

tired, and I am now gainfully employed outside, and I have no interest in it whatsoever.

Mr. Lavine: That is all. Do you have any questions?

Cross Examination

Q. (By Mr. Machtinger): When an Internal Revenue Agent assigned to the Fraud Squad prepared his report after the conclusion of an investigation, did he make a recommendation specifically for or against criminal prosecution?

A. That was somewhat of an open question. Some did and some did not. It was a matter somewhat of the attitude [24] of the agent and what he thought of the case. We usually tried to leave that open, because we didn't want a conflict in recommendations.

Q. Isn't it true that his main responsibility in his report was to present his case as far as the deficiency is concerned in any civil 50 per cent fraud penalty that he may recommend or not recommend?

A. Yes.

When you say "civil fraud penalty," though, in a case where the Statute of Limitations is still open for criminal prosecution, where you have got a civil fraud case, you usually have a criminal case, and there was very little difference, and I don't know of anyone that has yet been able to distinguish the difference between what is civil fraud and criminal fraud in a given case, when the Statute of Limitations has not expired on criminal prosecution.

Plaintiff's Exhibit No. 1—(Continued)
(Deposition of Paris B. Claypoole.)

Q. But aside from the distinction between the two, was it not the responsibility of the Special Agent to make his recommendation for the criminal aspects of the case, and the responsibility of the Internal Revenue Agent to make his recommendation with respect to the deficiencies due from the taxpayer? A. That is right.

Q. Weren't there many cases when an Internal Revenue Agent not assigned to your group virtually completed a case in which he had discovered all of the facts necessary [25] to prove criminal fraud, at which time the case would then be transferred to your group?

A. I do not recall that. We had rather a strict rule over there about that situation, and if anyone discovered evidence of fraud, he usually contacted me personally just as quickly as he could, and we would take it from there. I am quite sure that never happened during my tenure.

Q. But you did testify that there were instances in which an Internal Revenue Agent of the Field Division who had completed a large portion of the work necessary for the audit aspects, and whom you considered to be a capable agent, was then assigned, I gather temporarily, to your Group for the completion of the case?

A. You said "a large portion of the audit." No. Usually when they found evidence of fraud and they came to me with a problem, if I felt that they were qualified to carry on, they were automatically

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

transferred into my group and under my supervision for that case, and frequently remained there forever after working on other cases.

Q. But there were Agents who did not remain and who after the completion of the case went back to their regular duties?

A. There were Agents who not only did not remain, but did not complete the cases, and we took them away from [26] them and gave them to an agent who could really do the job.

Q. Well, let me ask you, there were Agents who did complete the investigation with a Special Agent, and were then re-transferred to their duties?

A. That is right.

Q. Did an Internal Revenue Agent attached to your unit ever go ahead with a criminal investigation where the Special Agent stated in his opinion there was no criminal case, and refused to go ahead with it? A. No.

Q. If the Special Agent refused to go ahead with it, then the criminal aspects of the case were dropped, is that correct?

A. We didn't pursue the case beyond that, no.

Q. But the man assigned to your unit would continue with the investigation of the case, as far as the civil aspects were concerned?

A. We never had any cases like that over there during my time.

Q. Regardless of your personal feelings as to what was accomplished when you called in Special

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

Agents, it was nevertheless necessary to call in a Special Agent if you were going to fully investigate a taxpayer for criminal purposes, is that right?

A. It was necessary to call in a Special Agent to comply with the regulations and the directives. [27]

Q. You stated before, I think quite accurately, the chronological sequence of the investigation reports. Now, the Regional Counsel's office that was referred to by Mr. Lavine, is a branch of the Chief Counsel's office, is that right? A. Yes.

Q. And all that was accomplished by the change was decentralizing the functions that had been performed previously in Washington to the local offices? A. That was the intent.

Q. And isn't it true that no criminal case was ever commenced unless the Regional Counsel or the Chief Counsel concurred in their recommendation to the Department of Justice that an indictment be sought? A. Was commenced, you mean?

Q. Let me rephrase that. The Regional Counsel or Chief Counsel had the authority to kill a case at his level, is that right? A. Yes.

Q. Were you in the Los Angeles office when the so-called Racket Squad was organized?

A. No, sir.

Q. Do you recall when the position of Technical Advisor to the Regional Counsel was created?

A. Yes, sir.

Q. When was that? [28]

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

A. I can't recall the date. I remember the circumstances.

Q. Do you remember the year?

A. No, I do not. I am not exactly sure as to the year.

Q. That is all I am interested in right now.

A. But I remember the circumstances.

Q. You don't remember the year? A. No.

Mr. Machtinger: I think that is all. No more questions.

Mr. Lavine: I have no further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Claypoole, if a taxpayer made admissions which could be used by the Government in a prosecution, were such admissions made part of the Revenue Agent's report?

A. Yes, sir.

Q. Was it customary procedure to include in the Revenue Agent's report any incriminating admissions made by the taxpayer? A. It was.

Q. When the questions were asked about the audit features of a criminal investigation case, just what did [29] that include?

A. Let me get that question again.

(The question was read.)

A. well, I—

Q. Let me rephrase my question.

A. All right.

Q. When you answered the questions concerning

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

the audit features of a fraud investigation, what did you mean to include in the audit features?

Mr. Machtinger: Mr. Mortenson, are you referring to specific answers to specific questions?

Mr. Mortenson: Yes.

Mr. Machtinger: Could you be a little more specific as to the questions that you are referring to? I myself don't know, and I think Mr. Claypoole is puzzled also as to what questions you are referring to.

Mr. Mortenson: Mr. Reporter, will you read the question in which Mr. Machtinger asked about the audit features of a case being the responsibility of the Revenue Agent?

Well, let me ask the direct question instead, and that will solve that.

Q. The instructions to Internal Revenue Agents referred to audit features of a case being the responsibility of the Revenue Agent. What is your interpretation of the words "audit features," Mr. Claypoole? [30]

A. Well, my interpretation of the "audit features" of a case is that the Revenue Agent should have completed his investigation to the point where he could include in his report all matters pertaining to the tax liability of the taxpayer, and all evidence of the facts indicating either civil or criminal penalties, and do it in such a way that he would be prepared not only to present the matter to a Grand Jury, but to testify as a witness in a civil or

Plaintiff's Exhibit No. 1—(Continued)

(Deposition of Paris B. Claypoole.)

a criminal case, either before the Tax Court or the United States District Court.

Q. In addition to securing evidence which would be used in the actual tax computations, what further duties did the Revenue Agent have in a fraud classification?

A. He had the duty of gathering of evidence to support the conclusion that is set out in his report, all the auditing features in an income tax investigation, every bit of evidence that was closely related to the audit features of the case.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

Mr. Machtinger: No questions.

(It was stipulated and agreed by and between counsel that the foregoing deposition shall be signed before any Notary Public, with the same [31] force and effect as though read and signed in the presence of the Notary Public before whom it was taken.)

/s/ PARIS B. CLAYPOOLE,
Signature of Witness.

Subscribed and sworn to before me, this 16th day of October, 1956.

[Seal] /s/ ELSIE GALE,
Notary Public in and for the County of Los Angeles, State of California. [32]

[Endorsed]: Filed October 19, 1956.

PLAINTIFF'S EXHIBIT No. 2

[Title of District Court and Cause.]

DEPOSITION OF VINCENT B. MURPHY

taken on behalf of the plaintiff, at Suite 625, Federal Building, Los Angeles, California, commencing at 10:00 o'clock a.m., Wednesday, October 10, 1956, before Charles C. Jenkins, CSR, Notary Public, pursuant to the annexed Stipulation.

Appearances of Counsel: For the Plaintiff: Ernest R. Mortenson, Esq. For the Defendant: Laughlin E. Waters, United States Attorney, Max E. Deutz, Assistant United States Attorney, Chief of Civil Division, by Richard A. Lavine, Assistant U. S. Attorney and Sidney J. Machtinger, Special Attorney, Internal Revenue Service. [1]*

VINCENT B. MURPHY

having been first duly sworn, deposed and testified as follows:

Direct Examination

Q. (By Mr. Mortenson): Mr. Murphy, will you state your name? A. Vincent B. Murphy.

Q. And what is your business or occupation?

A. Internal Revenue Agent.

Q. Are you also a Group Supervisor?

A. I am Supervisor of Group No. 7.

Q. And where is your office located?

A. In the Federal Post Office and Courthouse in Los Angeles.

* Page numbers appearing at top of page of Original Deposition.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Q. When were you made Supervisor of Group No. 7? A. October 2, 1949.

Q. On inter-office communications, what is the name usually given to Group No. 7?

A. Fraud Group.

Q. Before you were named Group Supervisor of the Fraud Group, what were your duties in the Internal Revenue?

A. Internal Revenue Agent in the Fraud Group.

Q. When did you first become acquainted with Oren E. Cummins? [2]

A. When I first came to California as an agent on January 2, 1938.

Q. What position did Mr. Cummins hold in 1938, if you recall?

A. He was an Agent in the Fraud Group, under the supervision of Mr. Warner E. Williams.

Q. Were you a Revenue Agent in the Fraud Group in 1938? A. I was.

Q. When you became Group Supervisor on October 2, 1949, what position did Mr. Cummins hold?

A. He was still a Revenue Agent in the Fraud Group.

Q. Do you recall when Mr. Cummins retired from the Service? A. December 31, 1954.

Q. Mr. Murphy, would you explain generally the functions of a Revenue Agent and the functions of a Special Agent during the time they conduct a joint investigation for fraud?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. Well, first of all, some cases originated, some allegational fraud cases originated in our Group, the Fraud Group, and some originated in the Special Intelligence Unit. If they originated in the Fraud Group, the Agent would make his investigation up to a point where he would have indications of fraud.

Q. Pardon me. By "Agent" you mean Revenue Agent? [3]

A. Revenue Agent. At that time he was instructed to cease operations and ask for the cooperation of a Special Agent. If the case was accepted for joint investigation by the Special Agent, they would then work together, the Revenue Agent and the Special Agent would work together to carry the case through to completion. At the end of the examination, the Special Agent would then submit the case with his recommendations as to whether he thought criminal action should be taken.

Q. During the investigation, roughly what were the duties of the Revenue Agent?

A. The Revenue Agent's duties were the audit features of the case. The Special Agent's duties were to procure evidence for criminal prosecution.

Q. By "evidence for criminal prosecution" do you mean evidence relating to the element of criminal intent, mainly? A. Yes.

Q. During the conduct of a joint investigation, speaking about the period when Mr. Cummins was a Revenue Agent in your Group did the Special

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Agent have any authority to order a Revenue Agent to do any particular act?

A. Well, that is a question. According to the rules and regulations, the Special Agent was supposed to be in charge of the investigation, but the Revenue Agent was supposed to be in charge of the audit features of the case, [4] so I don't think it has ever been definitely decided who was the boss, and that is a question that has been brought on as long as I can remember.

Q. Did the Special Agent have any disciplinary powers of any kind over the Revenue Agent?

A. Not that I know of.

Q. To whom did the Revenue Agent answer, insofar as supervision was concerned?

A. To his Supervisor in the Fraud Group.

Q. To whom did the Special Agent answer, insofar as authority and discipline was concerned?

A. To the Chief Special Agent.

Q. At the time that Mr. Cummins was a Revenue Agent, did the Special Agent in Charge and the Revenue Agent in Charge have a common Supervisor, or were their Supervisors independent of each other?

A. Well, at that time the only common Supervisor they had would be the Commissioner in Washington.

Q. The line of authority for the Special Agent proceeded in what way?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. I think it was direct from the Commissioner in Washington.

Q. Is it true that a Special Agent would report to the local Special Agent in Charge, and the local Special Agent in Charge would report to the head of the Intelligence Unit in Washington, who in turn was responsible to the [5] Commissioner?

A. That is the way I understand it, yes.

Q. In actual practice, in the investigation of a fraud case is it possible to divide duties into criminal and non-criminal features?

A. During the investigation, I would say no; but at the termination of the investigation, there would be certain items on which they would have sufficient evidence for criminal prosecution, and other items would be just technical.

Q. Under the rules and regulations in force during Mr. Cummins' tenure, was it possible for the Special Agent to make a recommendation of prosecution without the report of a Revenue Agent?

A. No. At that time the Revenue Agent was charged with the duties of submitting——

Mr. Machtinger: At what time? Will you specify what time?

Mr. Mortenson: My question was asked during Mr. Cummins' tenure.

Mr. Machtinger: The entire time of his tenure?

Mr. Mortenson: Yes.

The Witness: The Revenue Agent is charged with the duties of preparing a confidential report,

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

which is supposed to contain all the evidence necessary for the assertion of the 50 per cent civil penalty. That report was then submitted to the Special Agent, who in turn prepared [6] his own report as to the criminal portion of the case.

Q. What was usually presented as Exhibit No. 1 to the Special Agent's report?

A. The Revenue Agent's report.

Q. Is it true that all indictments brought for evasion of tax allege an amount of tax that has been evaded?

A. No, just those portions which you are able to prove criminal intent on.

Q. In the indictment is there always an allegation concerning a specific amount of tax which has been evaded?

A. I think so.

Q. Under the rules and the regulations who computed the figures for such an amount which was stated in the indictment?

A. Well, up to the time I think they formed a Technical Advisor to the Regional Counsel, I think that was done by the Revenue Agent; but after the appointment of a Technical Advisor to the Regional Counsel, I think it was his duty to compute the tax.

Q. As between a Revenue Agent and a Special Agent, whose duty would it be to compute the tax which would be stated in the indictment?

A. Well, it was always the duty of the Revenue Agent to compute taxes.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

Q. In your duty as a Group Supervisor of the Fraud Group, and as an Internal Revenue Agent investigating [7] fraud cases, do you recall any criminal prosecution in which a Revenue Agent did not take part in the investigation, where the indictment was for evasion of taxes?

A. Yes. Deputy Collectors at time worked up fraud cases.

Q. Except then for Deputy Collectors who did the same work as a Revenue Agent, were there any cases of prosecution without an investigation by either a Revenue Agent or a Deputy Collector?

A. Not for income tax evasion.

Q. In a joint investigation for fraud as between a Special Agent and a Revenue agent, which generally spent more time with the taxpayer, his associates and his employers?

A. Well, the Revenue Agent would have to spend more time, because he had to make the audit of the case.

Q. In the ordinary fraud case, where there is a joint investigation, who generally had the first personal contact with the taxpayer, as between the Revenue Agent and the Special Agent?

A. Prior to January 1, 1955, it was generally the Revenue Agent. Since January 1, 1955, the new mimeographed 55-19 states that preliminary investigation shall be made by the Special Agent, at which time he usually contacts the taxpayer.

Q. When Mr. Cummins was a Revenue Agent

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

under your supervision, what group handled the so-called "racketeer [8] cases"?

A. A special group was formed to handle racketeer cases. I think it was about 1950 it was put under the supervision of Mr. Raymond Maddocks.

Q. Prior to the organization of this Racket Squad, and since it was dissolved, what group handled the so-called racketeer cases?

A. Group No. 7, the Fraud Group.

Q. Was Mr. Cummins during the time he was under your supervision assigned any so-called "racketeer cases"? A. Yes.

Q. Mr. Murphy, we do not wish to have any of these names entered in the record, but it is permissible, I believe, for you to refer to the individuals in a way in which they may not be identified. I hand you a list of names, and ask you whether you have seen this before.

A. Yes, I have.

Q. Was that during the period when Mr. Cummins was seeking retirement?

A. That particular list was after Mr. Cummins had retired.

Q. And what does that list represent?

A. It purports to represent cases worked by Mr. Cummins while he was a member of the Fraud Group.

Q. And as far as you know, did he investigate the cases listed on these pages? [9]

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. From 1949 on I know to my knowledge that he did investigate all of those cases.

Q. Now, these names are listed under years, is that correct?

A. That is correct. It lists 1949, 1950, 1951, 1952, 1953 and 1954.

Q. In how many of the cases here were the taxpayers suspected of committing criminal fraud?

A. I think in all cases.

Q. What proportion assigned to Mr. Cummins when he was under your supervision were cases in which the taxpayers were suspected of committing criminal fraud?

A. I think all cases that were assigned to Mr. Cummins by me were potential fraud cases.

Q. By that do you mean that there was a suspicion that the taxpayers could have committed criminal fraud against the United States?

A. That's right.

Q. Now, without mentioning any names, do you find on this list the names of individuals who were considered racketeers or questionable characters?

A. Yes, quite a number of them.

Q. Mr. Murphy, was there at a time a list circulated in the Internal Revenue Service, then known as the Bureau of Internal Revenue, which purported to contain names of racketeers? [10]

A. Well, there was a list made up of suspected racketeers when the Racketeer Group was formed. That is the only list I know.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Mr. Lavine: That is in 1950?

The Witness: 1950.

Q. (By Mr. Mortenson): Do you know whether Mr. Cummins had personal contact with individuals who had been classified as possible racketeers?

A. Well, they hadn't been classified up to the time the Racketeer Group was started, but we considered them such.

Q. That is, taxpayers investigated by Mr. Cummins were deemed by you to be racketeers?

A. Yes, and by "racketeers" we considered gamblers and other persons in the criminal element.

Q. Mr. Murphy, will you say that Mr. Cummins was exposed to danger more than, the same as, or less than the Special Agents who cooperated with him in criminal fraud investigations?

A. Well, if you base that on an element of time working on the case, I would say that Mr. Cummins worked longer on the cases as a rule than the Special Agents, and if the Special Agent was open to any acts of violence by the taxpayer, I would think that Mr. Cummins was open to the same danger.

(A short recess was had.)

Q. (By Mr. Mortenson): Mr. Murphy, in the ordinary [11] investigation of a criminal case, is it necessary for the Revenue Agent to examine some or all of the books and records of the taxpayer?

A. When he can get them, yes; but there are

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

lots of cases where we cannot get any books and records of the taxpayer.

Q. Is it ordinary procedure to attempt to inspect the books and records of the taxpayer?

A. Yes.

Q. And whose function is it to make such an inspection? A. The Revenue Agent.

Q. Mr. Murphy, do you know when the Intelligence Unit, now known as the Intelligence Division, became a part of the Treasury Department?

A. I understand it was in 1919.

Q. Was that at the time when Mr. Elmer Irey and five other Post Office Inspectors transferred to the Treasury Department?

A. That is what I am told.

Q. Mr. Murphy, do you know whether it was a crime to evade taxes prior to 1919?

A. I think it was made a crime in 1919. Prior to that it was a misdemeanor.

Mr. Machtinger: Testify personally from your own knowledge, just what you know.

The Witness: Then I can answer that and say I don't [12] know.

Mr. Mortenson: That is all I have. Do you have any cross-examination, Mr. Lavine and Mr. Machtinger?

Cross Examination

Q. (By Mr. Lavine): In reference to the questions and your answers concerning the so-called Fraud Squad activities, with the exceptions that

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

you listed, giving some cut-off dates, 1950 and 1954 and 1955, do your answers cover the entire period of service which Mr. Cummins claims to have rendered?

Before I make that into a question, I will give you some little more definite questions along that line.

As I understand Mr. Cummins' case, he lists activities from the years 1928 to 1953, inclusive, or some parts of those years. Now, in your answers heretofore, when you have described activities of the Fraud Squad, do you also refer to the periods prior to your coming to California?

A. No.

Q. In other words, your testimony only relates to the period in your personal knowledge?

A. That is right.

Q. Mr. Murphy, you described the duties of one category of Internal Revenue Agents, namely, members of the so-called Fraud Group. Prior to the time of retirement of Mr. Cummins, which was January 31, 1954, what other [13] categories were there of Internal Revenue Agents?

A. Well, there was the regular Field Agent, who made the ordinary examination.

Q. What were his duties in the group?

A. Well, he would investigate returns given him for examination, and if he should find any indications of fraud, he would immediately stop his ex-

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

amination and transfer them over to the Fraud Group for consideration.

Q. Let's go through a typical case. Supposing I am under investigation—I as an individual, not as an Assistant U. S. Attorney. Let us suppose that an audit has been made by an Internal Revenue Agent attached to the Field Unit, say Internal Revenue Agent Smith. Supposing he has made a rather complete audit of my activities over a couple of years in question and finds or suspects there is a fraud. What happens then? Is his audit turned entirely over to the Fraud Squad, or what happens?

A. At the time Mr. Cummins was with us, if any Agent found indications of fraud, they would be submitted to the Fraud Group for consideration, and if we thought that there was sufficient indication of fraud, we would then ask for a joint investigation with a Special Agent.

Q. Who would then work with the Special Agent, the original Field Unit man?

A. No, he would transfer the case to the Fraud Group, and one of the Fraud men would go after the suspect. [14]

Q. In normal circumstances would the original agent have anything further to do with the case?

A. No.

Q. Not even in a situation where he had a substantial amount of work and made extensive notes?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. No, I don't ever know of an agent that has worked in the field in a fraud case.

Q. In other words, was Mr. Cummins assigned to this so-called "Racketeer Squad" during his tenure of duties? A. No.

Q. Mr. Murphy, I show you a copy of a document which is attached to a file marked "Certified and Corrected Copies of Official Documents," contained in the retirement file of Oren E. Cummins. I am not going to introduce this in evidence, because it is going to be introduced in evidence later, Mr. Murphy. I would like you to read that page and tell me whether that page is a job description, including tasks and performance standards of an Internal Revenue Agent GS-12 assigned to the Fraud Group during your term as head of that Group. Incidentally, for the purpose of referring to this, this is Exhibit E to the sheaf of documents that I have just mentioned.

Mr. Mortenson: Yes, and for further identification, it has the ending, "Internal Revenue Agent, GS-12, Assigned to Fraud Group," with signature at the bottom, "Vincent B. Murphy, Group Chief," dated 6-15-1951, with the name "Oren [15] E. Cummins, Agent," at the bottom.

Mr. Lavine: In view of the length of the question, and Mr. Mortenson's remarks, I will reframe my question.

Q. Does that page, this sheet, set forth job description, including task and performance stand-

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

ards of Mr. Cummins, as a member of the Fraud Group?

A. It does. You said this bore my signature and the signature of Cummins. This is just a copy, with the signatures typed in.

Q. For the purposes of identification, I show you the original of which this purports to be only a certified copy of the original. The copy that I have shown you appears to be a true copy, does it not? A. It appears to be, yes.

Q. Now, as part of the duties of members of the Fraud Squad, are they authorized by law or by regulation or by custom to issue or carry firearms? A. No, sir.

Q. Do they as a matter of course carry or possess firearms? A. No, sir.

Q. Now, with reference to the degree of risk run by members of the Fraud Group, during your tenure of office were any members of your Group shot at or assaulted with deadly weapons?

A. I don't know of any Agent or Special Agent that was [16] assaulted or shot at.

Q. Approximately how many years, Mr. Murphy, have you been engaged in activities in or comparable to the Fraud Group type of work?

A. Eighteen years.

Q. Are you aware of the nature of the case brought by Mr. Cummins? A. I am.

Q. In the event that Mr. Cummins should be successful in this case, would not the outcome of

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

this case serve as a precedent which would bear some possible relationship to your retirement rights? A. It is possible.

Q. With reference to the conduct of a fraud investigation case, as I understand it, Mr. Murphy, there are two parts or elements that must be established in a criminal fraud case, are there not; and those two elements may be broadly defined as the audit features of the case and the feature of establishing criminal intent? A. That is right.

Q. Is that a fair division? A. Yes, sir.

Q. In the initial part of the investigation, whether it be for fraud or otherwise, does not the Internal Revenue Agent conduct the audit feature of the case? A. Those are his duties. [17]

Q. And at some time during pursuit of that audit investigation, he may or may not discover something which causes him to suspect fraud, or which involves a criminal intent; is that correct?

A. That is right.

Q. And at that time he makes his initial report, and report of suspicions through channels to the Intelligence Unit, is that also correct?

A. That is true as far as the regular Field Group is concerned, but in the Fraud Group we usually went farther than that.

Q. Would you elaborate on that, please?

A. We even went so far as to get evidence which was later given to the Special Agent as a part of the criminal action.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

Q. In relation to what features of the case?

A. Any evidence which we found during the course of an audit; or lots of times we would find documents in the taxpayer's files which would be very valuable in the criminal case, and we would have those photostated, so that we would have them when they were necessary.

Q. In other words, the Internal Revenue Agent didn't close his eyes to the criminal intent features, but what he discovered he would turn over to the Special Agent?

A. Yes, or he would include them in his confidential report lots of times, and the Special Agent would get a copy [18] of it.

Q. Now, during the meeting in respect to the taxpayer, an Internal Revenue Agent examines his returns, his books and records, and makes an audit in the normal course of affairs. Isn't there a specific time in which the taxpayer realizes that a Special Agent has been called into the case?

A. Usually when the Special Agent shows up in his office and tells him he is from the Intelligence Unit.

Q. Isn't that normally the first time that the taxpayer realizes that he faces a potential criminal suit?

A. Yes, I would say so.

Q. And it is normally at that point that the taxpayer has real cause for alarm that a suit is very possibly in the offing, is that right?

A. Yes.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Q. So prior to that time, so far as the taxpayer is normally concerned, he hopes everything is going along smoothly, and he has nothing to worry about; is that correct?

A. Well, that depends on what kind of a conscience he has got.

Q. Well, prior to that time he has no special reason to believe that the Internal Revenue Agent is looking for or pointing at fraud, does he?

A. No, sir.

Q. Have you had occasion to work on any cases with a U. S. Attorney or the U. S. Attorney? [19]

A. Yes.

Q. And during the investigation of those cases, has it been a fact that the Assistant U. S. Attorney assigned the case has himself actively worked at finding evidence, such as examining witnesses and going out and looking at documents?

A. Yes, sir.

Q. Going out to banks and looking at records in some cases?

A. Well, usually they call for the Revenue Agent to go out and get copies of the records.

Q. In other words, the Internal Revenue Agent is the "leg man," to use the slang expression. But so far as the development of a case, has it been your experience an Assistant U. S. Attorney has in cases where it is necessary to further develop the case, performed certain of the duties that normally would be those of the Special Agent?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. Yes, sir.

Q. And some of the duties which fall in the purview of the Internal Revenue Agent?

A. Sometimes, yes.

Q. Now, is there a Division of the Internal Revenue Service which passes upon the sufficiency and legality of a criminal fraud case?

A. Yes, sir; the Regional Counsel's office.

Q. To your knowledge, what sort of work is done by the Regional Counsel's office in this case?

A. Well, they prepare the case for trial and line up the witnesses, and see that the evidence is sufficient to uphold the criminal charges.

Q. In your experience, in certain cases have members of the Regional Counsel's Office, in cooperation with the Internal Revenue Agent, Special Agent, performing some of the duties of investigation, overlapped those of the duties of the Internal Revenue Agent?

A. At times when the evidence is not clear, they will ask for verification and ask for additional evidence.

Q. And have they had occasion to interview some of the potential witnesses? A. Yes, sir.

Q. And criminal fraud cases? A. Yes, sir.

Q. And to interview the taxpayer in some cases, when appropriate? A. Yes, sir.

Q. Perhaps to go out to the taxpayer's premises on occasion?

A. Well, I don't know whether they go out to

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

the taxpayer's premises, but I know they have interviewed taxpayers.

Q. Suppose there is a situation, Mr. Murphy, where the Internal Revenue Agent has reported fraud, and the Special Agent has been called into the case, the Special [21] Agent has done a certain amount of investigation. Can the Internal Revenue Agent proceed with the development of a fraud case if the Special Agent says no, or refuses to acquiesce in a report recommending fraud?

A. As far as criminal action is concerned, why, when the Special Agent says he will not recommend it, there will be no criminal action; but the Revenue Agent then has to write a confidential report to uphold the 50 per cent fraud penalty.

Q. Is that true of all Internal Revenue Agents involved in a proper case, and not limited to members of the Fraud Squad? A. That is right.

Q. The Fraud Group? A. That is right.

Q. In a case where an ordinary, garden-variety Internal Revenue Agent finds evidence in a criminal case, doesn't he also submit such evidence or a summary of such evidence in his report to his superior?

A. He writes an information report giving in detail all that he has found during the course of his investigation.

Q. Which may include evidence which would point toward a criminal case?

A. That is right. Maybe I should qualify that

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

last statement as to the 50 per cent penalty. Prior to the mimeographed 55-19, fraud cases were always worked in the [22] Fraud Group. If a Special Agent turned them down for prosecution, we would continue on in the Fraud Group to finish the case. Those were the old regulations. Under the new regulations, if the Special Agent turns them down, they go direct to the Field. That is since January 1, 1955.

Q. Mr. Murphy, I will read to you now Section 4566.1 (1) of the Internal Revenue Manual, which provides, and I quote:

“Responsibility in all full-scale investigations for the development of evidence and for recommendations pertaining to the potential criminal features of the case and the ad valorem additions to the tax for civil fraud, negligence, or delinquency (excepting those concerning the tax estimations), shall be that of the Special Agent unless and until he withdraws from the case. He will be responsible for the method of procedure and conduct of the investigation. The cooperating officer will be responsible for the audit features of the case. The Internal Revenue Agent will also be responsible for taking any action necessary to protect the interests of the Government in respect to the statutory period for assessment.” [23]

Are you familiar with that regulation?

A. That regulation came out when 55-19 was put into effect on January 1, 1955.

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Q. And prior to that time did matters contained in that regulation cover the respective duties of the Special Agent and Internal Revenue Agent assigned to a case? A. In general, yes.

Mr. Lavine: That is all.

Mr. Machtinger: I would like to ask a question to clarify a point.

Cross Examination

Q. (By Mr. Machtinger): I think you said that prior to 55-19 the Internal Revenue Agent attached to Fraud would continue the investigation, even though the Special Agent had turned it down for criminal purposes? A. That is right.

Q. You mean, of course, he would continue in the civil aspect, and that included the 50 per cent civil fraud penalty? A. Yes.

Q. But no longer the criminal aspect of the case? A. No, sir.

Q. One other question with reference to a question [24] Mr. Lavine asked you:

After a Special Agent comes out, it is at that time that the taxpayer is first fully aware there is an investigation for criminal purposes, isn't that right? A. I think so, yes.

Q. And isn't it true the taxpayer understands the different functions of the Internal Revenue Agent, who may or may not be attached to the Fraud Squad, and the Special Agent, that the Special Agent is there for the criminal aspect of it?

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

A. I don't think the general public know much about the duties of agents.

Q. When the Special Agent is called out and is assigned to the case, isn't the taxpayer then advised of his rights, as far as the criminal features go, and possible prosecution?

A. He is supposed to be, yes.

Q. Until that time he isn't advised of that phase of the case, that possibly he may incriminate himself in particular documents and certain other aspects of the criminal investigation?

A. No, sir.

Q. So far as the primary responsibility between the Special Agent and the Internal Revenue Agent, it is clear between the two of them, isn't it, that the primary responsibility of the Special Agent is for the criminal [25] aspect, and the primary responsibility of the Revenue Agent attached to the Fraud Squad is for giving such technical advice in respect to the audit features as the Special Agent may require or request?

A. That is true.

Mr. Machtinger: I don't have any further questions.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): Mr. Murphy, does the fact that you might possibly be affected by the results of this action in the Federal Court have

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

any influence on the answers to the questions you have given today, or will give? A. No, sir.

Q. Now, Mr. Murphy, assume that a Special Agent has been assigned to a case, and the taxpayer has been warned of his Constitutional rights; does the Revenue Agent still pursue his work in the matter of investigating the case? A. Yes, sir.

Q. So that the questions relating to the knowledge of a taxpayer that he is suspected of crime, or his lack of knowledge, would relate to the preliminary investigation, would it not?

A. That's right. [26]

Q. Now, assume we have a situation where there is a double set of books, one of which corresponds to the figures on the tax returns, and the other one showing the actual results of business operations, which I consider to be an ideal fraud situation from the Government's standpoint; who normally would testify in court as to the contents of the books and records and the consequences of the double set of books? A. The Revenue Agents.

Q. Who would be the one, as between the Revenue Agent and the Special Agent, who would secure the books, audit the books, and make a report on such before the case goes to the United States Attorney's office?

A. During the years in question the Revenue Agent, who is usually the first man on the scene.

Q. Now, Mr. Murphy, some questions have been asked about the criminal features and the non-

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

criminal or audit features of an investigation. Would you classify the work in connection with examining a double set of books a criminal feature or a non-criminal feature of the investigation?

A. The examining of the books?

Q. Yes.

A. Well, I would think if you find two sets of books, and one is false, that that is part of the evidence that is going to be needed for criminal prosecution.

Q. That would be evidence of criminal intent, would it [27] not? A. I would think so.

Q. And it would be the duty of the Revenue Agent to conduct the examination in that regard, is that correct?

A. It is his duty to make an audit of all records.

Q. Do you know of any instances during the time that Mr. Cummins was a Revenue Agent, in which he had practically completed the investigation before a Special Agent was called in?

A. I think there were several cases like that.

Q. With regard to investigations conducted by Assistant United States Attorneys, in your experience what proportion of the evidence used in court would be developed in such manner?

A. Well, I don't know of any case where the evidence was developed. They asked for clarification of evidence or further evidence to prove that evidence. Of course, the duty of a Special Agent

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

was to procure evidence, and there may be cases where they call the Special Agent in.

Q. With regard to the function of the Regional Counsel's office in processing fraud cases, what portion of the evidence, in your experience, would be developed in that office after the case was referred to the Regional Counsel?

A. Well, that I couldn't answer definitely, because I wouldn't be apprized of what the Regional Counsel was [28] doing.

Q. Regarding the fact that a Special Agent is instructed to warn the taxpayer of his Constitutional rights, and the Agent asks for what might be privileged evidence subsequent to that, does the Revenue Agent usually have contact with the taxpayer? A. Definitely.

Mr. Mortenson: That is all I have.

Mr. Machtinger: May I ask another question or two?

Recross Examination

Q. (By Mr. Machtinger): After the completion of a joint investigation by the Special Agent and the Internal Revenue Agent, does the Internal Revenue Agent write a report which includes a special recommendation as to criminal prosecution?

A. No, sir.

Q. Isn't it only the Special Agent's report which recommends for or against criminal prosecution?

A. Yes, sir.

Q. And that Special Agent's report, if it is ap-

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Vincent B. Murphy.)

proved, is referred to the Regional Counsel's office, is that correct? A. That is correct.

Q. And no criminal prosecution is commenced unless [29] the Regional Counsel recommends criminal prosecution be commenced against the taxpayer? A. That is right.

Q. So in considering whether there shall or will be criminal prosecution against the taxpayer, the Internal Revenue Agent's report plays no part in the criminal aspects of the case?

Mr. Mortenson: Just a minute.

Mr. Machtinger: I will withdraw that. No further questions.

Mr. Lavine: No further questions.

Redirect Examination

Q. (By Mr. Mortenson): I don't know whether this is a question which you can answer, Mr. Murphy, but do you know whether it would be the duty of a Revenue Agent to report evidence of a crime against the Revenue Act to the local United States Attorney, in the event a Special Agent arbitrarily refused to recommend prosecution?

Mr. Machtinger: May I ask Mr. Mortenson to define the word "duty," whether it is duty within the scope or functions of the employee, or duty as a citizen?

Mr. Mortenson: I intended that to mean a statutory duty. [30]

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Vincent B. Murphy.)

Mr. Machtinger: As distinguished from a duty within the scope of the employment of the Internal Revenue Agent?

Mr. Mortenson: No, in connection with his employment as an Internal Revenue Agent. That is a matter of law, and probably is an improper question.

Mr. Machtinger: Do you withdraw the question? If not, I think we should object to it, because I don't think a witness such as Mr. Murphy could testify with reference to——

Mr. Lavine: Well, of course any objections are reserved until the time of trial.

Mr. Mortenson: No further questions.

Mr. Lavine: No further questions.

/s/ VINCENT B. MURPHY,
Signature of Witness.

Subscribed and sworn to before me this 17th day of October, 1956.

[Seal] /s/ VOLNEY V. BROWN, JR.,
Notary Public, County of Los Angeles, State of
California.

[Endorsed]: Filed October 19, 1956.

PLAINTIFF'S EXHIBIT No. 3

United States Civil Service Commission

Washington 25, D. C.

October 10, 1956

Address Only "Civil Service Commission." In
Your Reply Refer to File BAR:EPT:rsp, and
Date of This Letter CSA-380 606.

Airmail

Mr. Oren E. Cummins

918 Encanto Drive

Arcadia, California

Dear Mr. Cummins:

Your appeal to the Commission from the determination by the Retirement Division that your application for benefits under Section 1 (d) of the Civil Service Retirement Act may not be accepted has been referred to this Board for final decision.

The Board of Appeals and Review has made a study of the facts in your case. Section 1(d) of the Retirement Act provides that any officer or employee to whom this Act applies the duties of whose position are primarily the investigation, apprehension or detention of persons suspected or convicted of offenses against the criminal law of the United States (including any officer or employee engaged in such activity who has been transferred to a supervisory or administrative position) who is at least 50 years of age, and who has rendered 20 years of service or more in the performance of

Plaintiff's Exhibit No. 3—(Continued)

such duties (including the duties of a supervisory or administrative officer or employee) may on his own application and upon the recommendation of the head of the department or agency in which he is serving and with the approval of the Civil Service Commission retire under the provisions of this Section. Recommendation of the head of the department or agency in which the employee is serving is required and since the Treasury Department has not submitted such recommendation the statutory provisions of Section 1(d) of the Act preclude the acceptance of your application for benefits thereunder. Accordingly, the decision reached by the Retirement Division in your case is affirmed.

For the Commissioners:

Sincerely yours,

/s/ JOHN E. BLANN,

John E. Blann, Chairman,

Board of Appeals and Review.

PLAINTIFF'S EXHIBIT No. 4

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and refer to A:PT:PO.

May 2, 1955

Mr. O. E. Cummins
918 Encanto Drive
Arcadia, California

Plaintiff's Exhibit No. 4—(Continued)

Dear Mr. Cummins:

Commissioner Andrews has asked me to reply to your letter of April 11, 1955, concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

You have no appeal to the Civil Service Commission since retirement under Section 1(d) must be recommended by the head of the agency. It is not a right to which an employee becomes entitled by virtue of specific service but is discretionary with the Secretary of the Treasury.

Your case has received careful consideration but evidence has not been presented to conclusively prove that you performed the duties of a Special Agent, which is a position approved for coverage under Section 1(d). Therefore, we have no basis for ruling favorably on your appeal.

Your final appeal is to the Director of Personnel, Treasury Department. In your letter of March 21, 1955, you stated that you have information that Revenue Agents have retired under Section 1(d). In order that we may have the file complete, please furnish us with the names of these Revenue Agents. When we have this information, we will submit the entire file to the Treasury Department.

Very truly yours,

/s/ M. LATHAM, JR.,

(Acting) Director, Personnel
and Training Division.

PLAINTIFF'S EXHIBIT No. 5

U. S. Treasury Department

Washington 25

February 7, 1955

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to A:PT:PO.

Mr. Oren E. Cummins

918 Encanto Drive, Arcadia, California

Dear Mr. Cummins:

This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

The Treasury Department negotiated with the Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.

As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission.

Very truly yours,

/s/ M. J. FLATTERY,

M. J. Flattery, Chief, Placement Branch, Personnel and training Division.

Enclosure

PLAINTIFF'S EXHIBIT No. 6

U. S. Treasury Department

Washington 25

April 5, 1955

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to A:PT:PO.

Mr. O. E. Cummins
918 Encanto Drive
Arcadia, California

Dear Mr. Cummins:

This refers to your letter of March 21, 1955, addressed to Commissioner Andrews, with enclosures, concerning your desire to establish creditability of service for retirement under Section 1 (d) of the Retirement Act.

It is mandatory that an employee occupy a position approved for coverage under Section 1(d) at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of

Plaintiff's Exhibit No. 6—(Continued)

this Section. I am sorry, but we are unable to take any action in your case.

Very truly yours,

/s/ M. J. FLATTERY,

M. J. Flattery, Chief, Placement Branch, Personnel and Training Division.

PLAINTIFF'S EXHIBIT No. 7

(Copy)

PENALTY CASES

Page 8

Especially in fraud cases the investigation should be thorough and complete in every detail and the examining officer should arm himself with knowledge of every phase of the case for the further reason that he should be prepared to be an intelligent witness for the Government in the event of subsequent litigation, either in a civil trial before the Board of Tax Appeals in connection with the determination of penalty liability or in a criminal trial before the United States Federal Courts.

[Endorsed]: No. 16005. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Oren E. Cummins, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 7, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16005

UNITED STATES OF AMERICA, Appellant,

vs.

OREN E. CUMMINS,

Appellee.

STATEMENT OF POINTS

Appellant, the United States of America, will rely upon the following points in its appeal in the above case:

1. The district court erred in granting a money judgment for appellee for monies allegedly due him under the provisions of 5 U.S.C. 691(d).

2. The district court erred in holding that appellee at the time of his retirement had satisfied all of

the requirements for retirement under 5 U.S.C. 691(d).

3. The district court erred in holding that appellee is entitled to have his annuity computed under 5 U.S.C. 691(d).

4. The district court erred in holding that the refusal of the Secretary of the Treasury and the Civil Service Commission to grant appellee's retirement under 5 U.S.C. 691(d) was due to an erroneous interpretation of that Section.

5. The district court erred in holding that in the performance of his duties appellee was subjected to a degree of hazard as great or greater than the degree of hazard to which the Special Agent with whom he conducted investigations was subjected.

6. The district court erred in holding that appellee was subjected to a degree of hazard contemplated by 5 U.S.C. 691(d).

7. The district court erred in failing to dismiss the action for lack of jurisdiction.

8. The district court erred in holding that the Secretary improperly refused to recommend appellee for retirement under this Section.

9. The district court erred in holding that the Civil Service Commission improperly denied appellee retirement benefits under 5 U.S.C. 691(d).

10. The district court erred in holding that the Secretary of the Treasury and the Civil Service Commission negotiated a list of positions covered

by this Section because of an erroneous interpretation of the Statute.

/s/ SAMUEL D. SLADE,

/s/ ROBERT S. GREEN,

Attorneys, Department of Justice,
Counsel for Appellant.

Certificate of Service Attached.

[Endorsed]: Filed May 12, 1958. Paul P.
O'Brien, Clerk.

No. 16005

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

OREN E. CUMMINS, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,

LAUGHLIN E. WATERS,
United States Attorney,

SAMUEL D. SLADE,
ROBERT S. GREEN,
*Attorneys, Department of Justice,
Washington 25, D. C.*

FILED

SEP 7 1929

U. S. DISTRICT COURT



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16005

UNITED STATES OF AMERICA, APPELLANT

v.

OREN E. CUMMINS, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on December 13, 1957 by the United States District Court for the Southern District of California (Tolin, J.) granting judgment to the appellee for \$760 as retirement benefits due to him under the provisions of 5 U.S.C. 691(d). The district court's jurisdiction was based on 28 U.S.C. 1346(a)(2). The United States filed notice of appeal on February 6, 1958 (R. 30), time for docketing the record on appeal was extended by order of the district court to May 7, 1958 and the case was docketed in this Court on that date (R. 31, 142). This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF FACTS

Appellee, Oren E. Cummins, was employed by the Internal Revenue Service as an Internal Revenue Agent from March 26, 1928 to November 30, 1954, when he reached the mandatory retirement age of 70 years (R. 44). As an Internal Revenue Agent, appellee had since October 1928, been assigned to the "Fraud Group," with the duty of making joint investigations, with Special Agents of the Internal Revenue Service Intelligence Unit, of suspected violations of the criminal provisions of the Internal Revenue Code (R. 20, 44, 47-53).

Appellee on October 18, 1954, made application for retirement under former Section 1(d) of the Civil Service Retirement Act, 5 U.S.C. 691(d) (1952 ed.), *infra*, pp. 4-5, which provided particularly liberal benefits for persons eligible for retirement under that Section. The requirements for such eligibility, as set forth in the statute, are met by an officer or employee who (1) has performed certain hazardous duties as there defined for a period of at least twenty years; (2) is at least fifty years old; and (3) whose application for retirement under Section 1(d) has received the recommendation of the head of his department or agency, and the approval of the Civil Service Commission. The statute does not set any criteria for the granting or withholding of the recommendation of the head of the agency or department involved, but provides that upon such recommendation, the Civil Service Commission shall determine whether the officer or employee is entitled to retirement under Section 1(d). The Civil Service Commission, in making such determination, is required to give full consideration to the degree of hazard to which the officer or employee is

subjected in the performance of his duties, rather than the general duties of the class of his position.

The Secretary of the Treasury refused to recommend appellee for retirement under Section 1(d) (R. 138-141), and in the absence of such recommendation, the Civil Service Commission advised appellee that there was no authority for his retirement under that Section (R. 136-137). His retirement benefits were therefore computed under the general retirement provisions of Section 4(a) of the Act.

Appellee then brought this action in the court below (R. 3-6, 9-12), seeking in his amended complaint to recover the \$76 per month difference between the amount to which he would have been entitled if he had been retired under Section 1(d) of the Retirement Act, and the amount he had actually received since his retirement on November 30, 1954 under Section 4(a) of the Act (R. 11-12). He also prayed for a judgment declaring that he was entitled to be retired under Section 1(d) (R. 12). The district court, after a hearing, held that it had no jurisdiction to award declaratory relief in this case, but awarded a money judgment to appellee in the sum of \$760, representing \$76 per month for the ten months from December 1, 1954 to and including September 1955, the date of the filing of the complaint.

The court found (R. 20, 21-22, 27) that appellee met the requirements for retirement under Section 1(d) with respect to age, length of service, and type of work, and specifically, that appellee "in the performance of his duties was subjected to a degree of hazard contemplated by Section 1(d)" (R. 27). The court found, however, that the Secretary of the Treasury, in refusing to recommend appellee for Section 1(d) retirement,

had not considered the type of duties performed by appellee individually nor the degree of hazard to which he was individually subjected in the performance of these duties (R. 25-26). Instead, the court held, the Secretary had negotiated with the Civil Service Commission a list of positions which would be eligible for retirement under Section 1(d), and the Secretary had withheld his recommendation for appellee's retirement under this Section on the ground that, at the time of his retirement, appellee was not classified in one of these negotiated positions (R. 22-26).

On the basis of these and related findings, the court held (R. 27-28) that at the time of his application for retirement, appellee "had satisfied all of the requirements for retirement under Section 691(d) of Title 5, USCA and is entitled to have his annuity computed under said Section." The court stated (R. 28) that Congress had intended each application for retirement to be considered on its merits without regard to the particular title of the position held, and concluded (R. 28) that the "failure of the Secretary of the Treasury and the Civil Service Commission to grant [appellee's] retirement under Section 691(d) was due to an erroneous interpretation of said Section in that the refusal of such retirement was based upon a classification of positions which had been set up contrary to the provisions of said Section."

STATUTES INVOLVED

Former Section 1(d) of the Civil Service Retirement Act of 1930, as amended, 5 U.S.C. 691(d) (1952 ed.) provided as follows at the time of appellee's retirement:

Any officer or employee * * * the duties of

whose position are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States (including any officer or employee engaged in such activity who has been transferred to a supervisory or administrative position) who is at least fifty years of age, and who has rendered twenty years of service or more in the performance of such duties (including the duties of a supervisory or administrative officer or employee) may, on his own application and upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission, retire from the service; and the annuity of such officer or employee shall be equal to 2 per centum of his average basic salary for any five consecutive years of allowable service at the option of such officer or employee, multiplied by the number of years of service, not exceeding thirty years. The Civil Service Commission shall, upon recommendation by the head of the department or agency involved, determine whether such officer or employee is entitled to retirement under this subsection. In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee.

Present Section 6(c) of the Civil Service Retirement Act of 1930, as amended, and as renumbered by the Civil Service Retirement Act Amendments of 1956, 70 Stat.

744, 5 U.S.C. 2256(c) (1952 ed., Supplement V), which replaced former Section 1(d) and became effective on October 1, 1956, provides in pertinent part as follows:

Any employee the duties of whose position are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, including any employee engaged in such activity who has been transferred to a supervisory or administrative position, who attains the age of fifty years and completes twenty years of service in the performance of such duties may, if the head of his department or agency recommends his retirement and the Commission approves, voluntarily retire from the service and be paid an annuity computed as provided in [Section 9 of the Act]. The head of the department or agency and the Commission shall give full consideration to the degree of hazard to which such employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such employee. * * *

SPECIFICATION OF ERRORS

1. The district court erred in granting a money judgment for appellee for monies allegedly due him under the provisions of 5 U.S.C. 691(d).
2. The district court erred in holding that appellee at the time of his retirement had satisfied all of the requirements for retirement under 5 U.S.C. 691(d).
3. The district court erred in holding that appellee is entitled to have his annuity computed under 5 U.S.C. 691(d).

4. The district court erred in holding that the refusal of the Secretary of the Treasury and the Civil Service Commission to grant appellee's retirement under 5 U.S.C. 691(d) was due to an erroneous interpretation of that Section.

5. The district court erred in holding that in the performance of his duties appellee was subjected to a degree of hazard as great or greater than the degree of hazard to which the Special Agent with whom he conducted investigations was subjected.

6. The district court erred in holding that appellee was subjected to a degree of hazard contemplated by 5 U.S.C. 691(d).

7. The district court erred in failing to dismiss the action for lack of jurisdiction.

8. The district court erred in holding that the Secretary improperly refused to recommend appellee for retirement under this Section.

9. The district court erred in holding that the Civil Service Commission improperly denied appellee retirement benefits under 5 U.S.C. 691(d).

10. The district court erred in holding that the Secretary of the Treasury and the Civil Service Commission negotiated a list of positions covered by this Section because of an erroneous interpretation of the Statute.

The District Court Should Have Dismissed Appellee's Suit for Failure to State a Claim Upon Which Relief Could Be Granted

A. Appellee's Failure to Obtain the Recommendation of the Secretary of the Treasury Precludes His Claim for Retirement Benefits Under Section 1(d) of the Retirement Act.

1. *The retirement benefits of Section 1(d) are to be allowed only in the discretion of the head of the employee's agency.* Former Section 1(d) of the Civil Service Retirement Act, 5 U.S.C. 691(d) (1952 ed.) (*supra*, pp. 4-5), under which appellee sought to retire, expressly vests in the head of the employing agency complete discretion to determine whether an employee will be considered for retirement under that Section. The statute provides that a Government employee whose duties are primarily investigatory and who is at least fifty years old and has rendered at least twenty years of service in the performance of such duties "may, on his own application and upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission, retire from the service * * *." The statute spells out the method of computing the annuity payable to such an employee, and then provides:

The Civil Service Commission shall, upon recommendation by the head of the department or agency involved, determine whether such officer or employee is entitled to retirement under this subsection. In making such determination, the

Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee.

Thus, Section 1(d) on its face makes perfectly clear that its special retirement provisions can only apply to an otherwise eligible employee where the head of the agency so recommends; in the absence of such a recommendation, the employee has no right whatever to the benefits of the Section.

a. The reason for this requirement becomes immediately apparent upon examination of the history and purpose of Section 1(d). This Section is part of the Civil Service Retirement Act of 1930, 5 U.S.C. 691 *et seq.*, dealing generally with retirement of civil service employees. As originally enacted the Retirement Act sought, *inter alia*, to provide for the voluntary retirement of employees of a certain age who had served a minimum number of years (5 U.S.C. 691) and the compulsory retirement of persons who, by reason of age, were no longer able to render satisfactory service (5 U.S.C. 715). The latter provision required the retirement on an annuity of any employee who had completed fifteen years of service and had reached his seventieth birthday. In 1947, Congress amended the Retirement Act to provide for the *voluntary* retirement "on his own application and with the consent of the Attorney General * * *" of any special agent or other investigation employee of the Federal Bureau of Investigation who was at least fifty years of age and had rendered twenty years or more of service in such capacity. Public Law 168, 61 Stat. 307, 80th

Cong., 1st Sess.¹ The object of this amendment was to allow, *with the consent of the Attorney General*, men in that service to retire earlier in order that younger men might be induced to enter it. See U.S.C. Congressional Service, 80th Cong., 1st Sess., 1947, p. 1277. A more liberal method of computing the annuity in such instances was provided in order to prevent an economic hardship on the employee and to provide an incentive for the employee to accept earlier retirement. Thus the Attorney General was able, when he felt the bureau needed younger men to perform its duties more effectively, to offer to its older employees the opportunity to retire under the provisions of this Act. The statute, however, created no *right* in the agents to such retirement; by its terms the Attorney General was not obligated to retire F.B.I. employees merely because they met the age and length of service requirement, but was expressly given the authority to allow their retirement in his discretion.

In 1948, Congress extended these special retirement provisions to other Government agencies employing personnel engaged primarily in law enforcement. The

¹ Public Law 168 provided:

Section 1(b) of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by adding at the end thereof the following new subsection:

(i) Any special agent, special agent in charge, inspector, Assistant Director, assistant to the Director, Associate Director, or the Director, who is at least fifty years of age and who has rendered twenty years of service or more as a special agent, or as aforesaid above, in the Federal Bureau of Investigation may, on his own application and *with the consent of the Attorney General*, retire from the service and such annuity of such employee shall be equal to 2 per centum of his average basic salary for the five years next preceding the date of his retirement, multiplied by the number of years of service, not exceeding thirty years. [Emphasis supplied.]

1948 amendment, which introduced the change upon which appellee here bases his claim, likewise restricted its benefits to those employees who secured "the recommendation of the head of the department or agency" in which they were serving. 5 U.S.C. 691(d), *supra*, p. 5. The legislative history of this amendment, as well as its language, establishes that, as in the original provision, this privilege of early retirement was not given as an absolute right to the employee, but was wholly dependent upon the decision of his agency head, who presumably would consider such factors as the agency's need for younger men in its more hazardous positions.² In short, the purpose of the Act, as demonstrated throughout its history, is not primarily to confer any benefit upon employees within its coverage, but rather to enable the Government agencies involved, by selective use of these special benefits, to maintain a force of relatively younger men more capable of performing the hazardous duties to which the Act refers. Unlike other retirement provisions, which are primarily intended for the benefit of the employees themselves, retirement under Section 1(d) remains, in

² See U.S. Code Congressional Service, 80th Cong., 2d Sess., 1948, p. 2275. Moreover, this legislative history strongly indicates that Internal Revenue Agents were not contemplated as coming within the meaning of the provision. Thus, while some of the suggested drafts of bills to amend Public Law 168 followed the form of that law and specified which employees could be retired under this special provision, none of them specified Internal Revenue Agents. See, *e.g.*, the employees listed in the draft on p. 2281 of U.S. Code Congressional Service, 1948, *supra*. The bill as it was finally enacted, Public Law 879, 62 Stat. 1221, July 2, 1948, deleted all reference to which employees could be retired under the Act and entrusted to the Civil Service Commission the determination whether employees, who had been recommended for such retirement by their agency heads, in fact had performed duties which fall within the purview of the statute.

the first instance, a matter for the agency head himself, as an important administrative tool in maintaining the efficiency of the service; and the employee himself therefore has no vested right to these benefits. As the Civil Service Commission points out in its Federal Personnel Manual:

The legislative history of this provision shows that its purpose is to allow the earlier retirement of certain employees whose duties are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States who, because of the physical requirements of their positions and the hazardous activities involved, are no longer capable of carrying on efficiently. Their replacement by younger men would improve the service. A more generous method of computing the amount of annuity is provided, not as a special reward for the type of service involved, but rather because a more liberal formula is usually necessary to make the earlier retirement (with resultant shorter service) economically possible.

The agency head's recommendation for retirement under this provision is discretionary, and the law does not require him to recommend retirement merely because the employee meets the age and service requirements. He should exercise his discretion to recommend favorably only when he determines that the public interest would be best served by the employee's retirement with annuity computed under the generous formula applicable.

* * *³

³ Civil Service Commission Federal Personnel Manual R-5-36. Since the Civil Service Commission is charged with the re-

b. The foregoing discussion of the history and purpose of Section 1(d), as well as the language of the statute itself, makes clear that no matter how well qualified with respect to the other statutory requirements an employee may be, he nevertheless cannot be approved by the Civil Service Commission for retirement under this provision unless he has also received the recommendation of his agency head. Thus the statutory language not only requires both the recommendation of the employing agency and the approval of the Civil Service Commission as independent and equally necessary prerequisites to Section 1(d) retirement⁴ but leaves no doubt as to the difference between the functions of the two agencies in effecting an employee's retirement under the Section. On the one hand, the statute sets no objective standard to govern the granting or withholding of the employing agency's recommendation; and in light of our discussion of the purpose of the Act, *supra*, pp. 10-12, it is perfectly clear that this was deliberately done to permit the agency head himself to make this determination on the basis of his own assessment of the public

sponsibility for the administration of the Federal Retirement Program, including the issuance of regulations and instructions thereunder (5 U.S.C. 709), the agency's interpretation of the statute should, of course, be accorded great weight. *United States v. Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *United States v. Madigan*, 300 U.S. 500, 505. This rule has special applicability where, as here, " * * * it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315.

⁴ The first sentence of the statute provides that an otherwise eligible employee may retire under the Section "upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission

interest and the needs of the service, rather than simply in terms of the individual employee's qualifications. Only if the agency head determines to recommend him for 1(d) retirement does the employee then acquire the right to have his personal qualifications for these benefits evaluated by the Civil Service Commission. The statute makes this plain, by expressly providing in its second sentence that the Commission "*shall, upon recommendation by the head of the department or agency involved, determine whether such officer or employee is entitled to retirement under this subsection*" [emphasis supplied]. In determining this entitlement, the Civil Service Commission must, of course, apply the objective statutory criteria with respect to age, length of service, and appropriately hazardous duty, including the admonition in the final sentence of Section 1(d) to "give full consideration to the degree of hazard" to which the individual employee is subjected. But an employee is not entitled to have the Commission even consider these qualifications, let alone approve his retirement under Section 1(d), unless the head of the employing agency has *first* recommended him for these benefits.⁵

⁵ Although the Act was amended in 1956 to require the agency head as well as the Civil Service Commission to consider the degree of hazard to which the individual employee was subjected, we show (*infra*, pp. 21-23), (1) that this new legislation does not apply to the appellee; (2) that it in fact accentuates the extent of the discretion which Section 1(d) vested in the agency head; and (3) that even if this new language did apply to appellee, it would still not require his agency head to recommend him merely because he was engaged in performing hazardous duties. Both the old and the new statutes, as we show, leave the agency head with full discretion to withhold his recommendation if, in his view, the needs of the service or other such factors so indicate.

2. Since the appellee was not recommended by the Secretary of the Treasury for retirement under Section 1(d), the district court should have dismissed his claim for the benefits of that Section. As we have shown, *supra*, pp. 8-14, the recommendation of the head of the employee's agency is a statutory requisite for retirement under Section 1(d) of the Retirement Act. Since the Secretary of the Treasury, as head of the agency where appellee was employed, refused to recommend him for such benefits, the district court plainly should have dismissed his complaint for failure to state a claim upon which relief could be granted. For, although a district court in a suit under the Tucker Act has jurisdiction over a claim for an annuity, *Dismuke v. United States*, 297 U.S. 167, the Supreme Court has made clear that the court can only grant relief where the administrative denial of the benefit turned upon a pure question of law. "[T]he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled." *Id.* at 172. A different rule applies, however, in cases where the authority to decide whether the claimant shall receive the benefit is by statute conferred upon an administrative officer. "If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his." *Ibid.*

a. This principle of the *Dismuke* case is not, of course, novel doctrine; for more than a century, the Supreme Court has consistently recognized that administrative discretion in such matters is not for

judicial review.⁶ Thus, in *United States v. Geo. S. Bush & Co., Inc.*, 310 U.S. 371, 380, Mr. Justice Douglas pointed out:

* * * It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.* * *

The latest in the long line of cases upholding this doctrine, *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, again makes clear that while judicial relief is often available in "situations where ministerial duties of a nondiscretionary nature are involved", the courts cannot intervene where "the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U.S. at 318.

This, of course, is such a case. As we have shown in Point A-1, *supra*, pp. 8-14, the authority to recommend an employee for retirement under Section 1(d) is by statute vested completely in the discretion of the head of the employing agency. The district court has no jurisdiction to substitute its discretion for that of the agency head, nor, since the statute laid down no standards to govern the exercise of this discretion, could the court inquire into the reason why the recommendation

⁶ See, e.g., *Martin v. Mott*, 12 Wheat. 19, 31, where Justice Story stated:

* * * Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. * * *

had been denied.⁷ Since this recommendation was a *sine qua non* to retirement under Section 1(d), its absence completely precluded the district court from awarding appellee the benefits of this Section. Just as if appellee had failed to meet one of the other statutory requisites, such as age or length of service, so, too, his failure to obtain the recommendation of the Secretary of the Treasury required the district court to dismiss his suit for failure to state a claim upon which relief could be granted.⁸

b. Precisely this result was reached in the only other case to consider this question, *Gibney v. United States*, 146 F. Supp. 135 (S.D. Calif.). The facts in the *Gibney* case were on all fours with those here; Gibney, like Cummins, was an Internal Revenue Agent attached to the Fraud Unit, and when the Secretary of the Treasury refused to recommend him for retirement under Section 1(d), he brought suit for the benefits of that Section. Chief Judge Yankwich, in an extensive and carefully reasoned opinion, sustained the Government's defense that the complaint had failed to state a claim upon which relief could be granted. After analyzing the language and the legislative history of Section 1(d),

⁷ Even if the administrative discretion had been abused, appellee could only challenge its exercise in a mandamus action brought in the District of Columbia. See *infra*, pp. 24-28.

⁸ Cf. *Palmer v. United States*, 129 C. Cls. 322, 121 F. Supp. 643, where a Tucker Act suit for benefits under Section 1(d) of the Retirement Act was predicated upon the allegation that the plaintiff had been improperly transferred from a position within the coverage of the Act after only fifteen years, thus preventing him from obtaining the necessary twenty years of service. The Court of Claims pointed out that any action based upon the allegedly improper transfer was barred by limitations, and held that since plaintiff could not show he had held a covered position for twenty years, his suit must be dismissed for failure to state a claim upon which relief could be granted.

Judge Yankwich found that Congress had made both the recommendation of the head of the employing agency and the approval of the Civil Service Commission "conditions precedent to the granting of voluntary retirement under these more favorable conditions. (146 F. Supp. at 139.) He pointed out (*id.* at 140) that Congress had not "laid down any rules under which the recommendation of the head of the agency shall be granted," and, accordingly, that, under the ruling in *Dismuke v. United States, supra*, the court had no power to question the exercise of administrative discretion in refusing such recommendation.⁹ We submit that Judge Yankwich was clearly correct and that this action, too, should have been dismissed for failure to state a claim upon which relief could be granted.

B. The District Court Erred in Awarding Appellee Section 1(d) Benefits on the Ground That He Was Denied Them Because of an Erroneous Interpretation of the Statute.

As we have shown in our first point, *supra*, pp. 8-18, the failure of the appellee to secure the recommendation of the Secretary of the Treasury for his retirement under Section 1(d) required that his suit be dismissed

⁹ The court also stated, by way of dictum, that since Gibney had not shown that he had performed appropriately hazardous duties, the court could not question the administrative determination "even if the Secretary of the Treasury and the head of the Civil Service Commission, both of whom have their official residence in the District of Columbia, were parties to this action * * *" (146 F. Supp. at 141). We consider the question of jurisdiction over these officials, as well as Judge Yankwich's discussion in the latter part of his opinion (146 F. Supp. at 141-142) as to the validity of the refusal to permit retirement under Section 1(d) of Internal Revenue Agents attached to the Fraud Unit, in our Point B-2, *infra*, pp. 24-28.

for failure to state a claim upon which relief could be granted. Such a recommendation is a condition precedent to entitlement to these benefits, and by statute is to be granted solely in the discretion of the agency head. Since, as we have shown, the district court was without power to interfere in this exercise of administrative discretion, the lack of the required recommendation was fatal to appellee's claim.

Nevertheless, the court below held that appellee was entitled to relief because the refusal of the Secretary of the Treasury to recommend his retirement under Section 1(d), and of the Civil Service Commission to approve such retirement, was based upon an erroneous interpretation of the statute. We submit that the district court was clearly wrong in awarding judgment to the appellee on this basis. As we shall show, *infra*, pp. 19-24, there was in fact no violation of any of the statutory requirements by either the Secretary of the Treasury or the Civil Service Commission. But even if there were a violation of the statutory mandate, we show further, *infra*, pp. 24-28, that in the circumstances here such a violation could be challenged only by a mandamus action in the District Court for the District of Columbia, the only court which could acquire personal jurisdiction over either the Secretary of the Treasury or the members of the Civil Service Commission in their official capacities.

1. *Neither the Secretary of the Treasury nor the Civil Service Commission misinterpreted the statute in denying appellee's retirement under Section 1(d).* The court below based its judgment for appellee on the ground that he had been denied Section 1(d) retirement because of an erroneous interpretation of the statute. The court found that the Secretary of the

Treasury and the Civil Service Commission had refused to grant appellee the benefits of Section 1(d) because he was not employed in a position which the two agencies had approved for entitlement to the provisions of that Section, and held that the determination on this basis violated the statutory mandate to consider the degree of hazard to which the individual employee was subjected in the performance of his duties rather than the general duties of the class of the position which he held. We submit that there is no basis for this conclusion, and that neither of the agencies failed to comply with the requirements of the statute.

a. In the first place, it is obvious that since the appellee had never been recommended for Section 1(d) retirement by the head of his agency, the question of the degree of hazard to which he was subjected in the performance of his duties never even became relevant. The statutory admonition that the degree of hazard be determined on an individual basis does not apply to the head of the employing agency in granting or withholding a recommendation for Section 1(d) retirement; to the contrary, we have shown that Congress has endowed the agency head himself with full discretion to make the initial selection of employees who would be considered for this special retirement. The requirement that individual hazard be considered expressly applies only to the *Civil Service Commission*, in determining the eligibility of an employee who has already received such a recommendation. Section 1(d) provides that once an employee has been recommended for special retirement by the head of his agency, the Commission shall then determine his entitlement thereto; and the statute continues: "In making such determination, *the Commission* shall give full consideration to the degree

of hazard to which such officer or employee is subjected in the performance of his duties * * *.” [Emphasis added.] Manifestly, this requirement has no application to the head of the employing agency, and in no way restricts his discretion in the first instance to grant or withhold his recommendation, in accordance with his own concept of the needs of the service, employee morale, and any other factors which he deems relevant.

b. Subsequent to appellee’s retirement, Section 1(d) was amended and renumbered as Section 6(d) by the Civil Service Retirement Act Amendments of 1956, P.L. 854, 70 Stat. 736, 744, 5 U.S.C. (1952 ed., Supplement V) 2256(c). This statute became effective October 1, 1956, and specifically provided in Section 403 that it would not apply in the case of employees retired or otherwise separated prior to its effective date. See 5 U.S.C. 2251, note (1952 ed., Supplement V). Section 6(c) *supra*, pp. 5-6, provides, as does former Section 1(d), that an employee primarily engaged in law enforcement may obtain special retirement benefits if he receives the recommendation of his agency head and the approval of the Civil Service Commission. Unlike former Section 1(d), however, Section 6(c) requires that *both* “[t]he head of the department or agency and the Commission shall give full consideration to the degree of hazard to which such employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such employee.”

Although the appellee is not covered by the new Section 6(c), this subsequent legislation throws additional light upon the validity of the administrative action in refusing to recommend him for Section 1(d) benefits. It is, of course, well settled that “[s]ubsequent legis-

lation may be considered to assist in the interpretation of prior legislation upon the same subject.” *Tiger v. Western Investment Co.*, 221 U.S. 286, 309; *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 277; cf. *United States v. Hutcheson*, 312 U.S. 219; *Brown v. Duchesne*, 19 How. 183, 194. Here, as both the new statute and its legislative history make clear, Congress was for the first time placing a condition upon the exercise of the agency head’s previously unfettered discretion to grant or withhold his recommendation for special retirement benefits as he saw fit. The Senate Report on H.R. 7619, the bill which became P.L. 854, expressly stated with respect to the new Section 6(c) (S. Rep. 2642, 84th Cong., 2d Sess., p. 7) :

Section 6(c)

Under existing provisions relating to the retirement of employees whose duties are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, the Civil Service Commission is required to give full consideration to the degree of hazard to which the employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by the employee. Under the bill the head of a department or agency would likewise be required to give consideration to these factors in recommending retirement of an employee under these provisions.

Thus this legislative history leaves no doubt “that Congress thought that it was changing the law by changing the language of the Act,” *United States v. Plesha*, 352 U.S. 202, 208, and that under former Sec-

tion 1(d) the head of the agency was not required even to consider degree of hazard in determining whom to recommend for special retirement.

Moreover, it should be noted that even under the new Section 6(c), the right of the administrator to withhold his recommendation upon some other ground is in no way circumscribed by the statutory admonition to consider the individual degree of hazard to which an applicant was subjected. Thus, an administrator can still determine—and doubtless often does—that even though an individual employee was subjected to considerable hazard, nevertheless the needs of the service or another of the factors which we discussed above (*supra*, pp. 10-12, 14), warrant his withholding his recommendation for this special retirement. Nor is there any reason why he should not determine, on the basis of such factors, to refuse to recommend all the occupants of a given position for special retirement. The statute certainly does not prohibit this, and it is easily conceivable that the needs of the Service might dictate retaining, for example, all Internal Revenue Agents in the fraud group as long as possible.

c. Finally, there is no substance to the court's finding that the Civil Service Commission violated the statutory terms by failing to consider the degree of hazard to which appellee as an individual was subjected. As we have shown, the Civil Service Commission is required to consider the factor of degree of hazard, like those of age and length of service, only where an employee has been recommended for Section 1(d) retirement by his agency head; in the absence of such recommendation, the Civil Service Commission has no authority even to consider whether an employee has satisfied any of these statutory criteria, much less to ap-

prove his retirement under Section 1(d). See *supra*, pp. 13-14. Since the appellee here never received such a recommendation, the Commission was required to refuse his application without reaching any of these other matters. And, as the record makes clear, the Commission did precisely this; its letter to appellee (R. 136-137) unequivocally advised him that his application was being rejected because of his failure to satisfy a condition precedent to such retirement, the recommendation of his agency head. Thus, the Commission never had occasion even to consider the degree of hazard to which appellee had been subjected, and obviously did not deny appellee's application on the basis of such a consideration.¹⁰

2. *If appellee was denied Section 1(d) benefits because of a misinterpretation of the statute, he must in the circumstances of this case seek relief solely through a mandamus action brought in the District of Columbia.* Even if, contrary to the foregoing discussion, the dis-

¹⁰ Even if the appellee had been recommended by the Secretary of the Treasury for Section 1(d) retirement, the Commission could properly have refused to approve his retirement on the basis of the position he held, without violating the statutory admonition to consider the degree of hazard to which the individual employee was subjected. For the legislative history of this provision indicates that it is intended only as a *limitation* upon entitlement to Section 1(d) benefits, and operates to prevent blanket inclusion within the Act of all occupants of any position. See H. Rep. 2034, 80th Cong., 2d Sess., reprinted in U.S. Code Congressional Service, 1948, p. 2275, at 2276. As Judge Yankwich pointed out in the *Gibney* opinion, 146 F. Supp. at 139-140, it would not be arbitrary to classify Internal Revenue Agents attached to the Fraud Unit as not being primarily engaged in enforcement of the criminal law within the meaning of the Act. What the Commission could not do under the language of Section 1(d) would be to *approve* all of the occupants of a position, without considering the degree of hazard to which they were individually subjected; and that question, of course, is not involved here.

strict judge was justified in finding that appellee was denied special retirement benefits because of an erroneous application of Section 1(d), it is clear that the court below was without jurisdiction to award him these benefits. As we have shown, *supra*, pp. 8-18, the failure of appellee to obtain the recommendation of the Secretary of the Treasury was, as a matter of law, fatal to his Tucker Act suit. Accordingly, while he may have a legal remedy if this recommendation was improperly withheld, such a remedy must be pursued by seeking a writ of mandamus in the District Court for the District of Columbia.

a. Even upon appellee's own theory of this case, as adopted by the court below, his suit must be, not for a money judgment for Section 1(d) retirement benefits (for he has never satisfied the statutory requirement of a recommendation for such benefits), but rather an order to compel the Secretary of the Treasury to exercise his discretion in accordance with law. Similarly, any relief to which appellee might be entitled against the Civil Service Commission must likewise be obtained through a personal suit against the Commissioners, themselves, in their official capacity, to compel them to abandon the practice of negotiating with the various agencies' lists of positions to be covered by or excluded from Section 1(d). This is plainly the only manner in which appellee could attack the alleged abuse of administrative discretion which he claims has deprived him of his right to Section 1(d) retirement. Such an action, however, is in the nature of a writ of mandamus, and must therefore be brought in the District of Columbia Circuit, the only court authorized to compel official action through mandatory proceedings. Among the long line of cases so holding, in reliance on

Sections 11 and 14 of the Judiciary Act of 1789 (1 Stat. 78, 81-82, now 28 U.S.C. 1332, 1345, 1651), see, *e.g.*, *McIntire v. Wood*, 7 Cranch 503, 504; *McClung v. Silliman*, 6 Wheat. 598; *Bath County v. Amy*, 13 Wall. 244, 248; *Rosenbaum v. Bauer*, 120 U.S. 450; *Knapp v. Lake Shore & Michigan Southern Ry. Co.*, 197 U.S. 536; *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109; *Stevenson v. Holstein-Friesian Ass'n.*, 30 F. 2d 625, 626 (C.A. 2); *Truth Seeker Co. v. Durning*, 147 F. 2d 54, 56 (C.A. 2); *Amchanitzky v. Sinnott*, 69 F. 2d 97 (C.A. 2).¹¹

Moreover, since the very administrative officials against whom appellee must seek relief—the Secretary of the Treasury and the members of the Civil Service Commission—are officially domiciled in the District of Columbia, only that District Court can obtain the necessary jurisdiction over them in their official capacities. *Blackmar v. Guerre*, 342 U.S. 512. Thus, whatever the nature of the relief sought by appellee, the fact that, as we have shown, it must be pursued against these officials *eo nomine* requires that his action be brought in the District of Columbia.

b. Even in an action brought in the District Court for the District of Columbia, however, it is plain that appellee would not be able to compel the Secretary of the Treasury to recommend his retirement under Section 1(d). As we have shown (*supra*, pp. 8-14), such a rec-

¹¹ This principle has not been altered by the promulgation of Rule 81(b), F.R.C.P., nor by the codification of Title 28 in 1948. See, *e.g.*, *Petrowski v. Nutt*, 161 F. 2d 938, 939 (C.A. 9), certiorari denied, 333 U.S. 842; *Marshall v. Crotty*, 185 F. 2d 622 (C.A. 1). Nor does the Administrative Procedure Act give the court below jurisdiction to grant such relief; *Blackmar v. Guerre*, 342 U.S. 512, 515-516; *Adcox Schools v. Administrator of Veterans Affairs*, 217 F. 2d 54 (C.A. 9).

ommendation is by law committed to the discretion of the agency head. Mandamus, of course, lies only to compel a ministerial act, *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48; *Wilbur v. United States*, 281 U.S. 206, 218; *Interstate Commerce Commission v. United States ex rel. Campbell*, 289 U.S. 385, 393-394, and cannot control the exercise of discretion. Accordingly, even a court with necessary jurisdiction could, at most, have required the Secretary to exercise his discretion in accordance with law—*i.e.*, by not denying his recommendation to appellee solely on the basis of an erroneous interpretation of the statute—but could not have assumed to control or guide the exercise of this discretion by requiring the Secretary to grant such recommendation. See *e.g.*, *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144-145; *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 551; *Interstate Commerce Commission v. Humboldt S.S. Co.*, 224 U.S. 474, 485.¹²

In any event, it is clear that the court below had no jurisdiction either to award appellee benefits which by statute are within the discretion of his agency head, or to interfere with the exercise of this discretion. Even if, as appellee contends, he had been denied these benefits because of an erroneous interpretation of the statute, his remedy lies against the administrative officials

¹² Similarly, even under the new Section 6(c), which replaced former Section 1(d) (see *supra*, pp. 21-23), no court could order the Secretary to recommend appellee for special retirement. For although the new statute requires the Secretary, in determining whether to grant his recommendation, to consider the degree of hazard to which the employee was exposed, it clearly does not limit his discretion to deny his recommendation for any other reason to any employee, whether or not he had performed hazardous duties.

themselves, in an action in the District of Columbia, their official domicile. He has sued the wrong defendants in the wrong court, and his action must be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed.

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APPENDIX

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No. 16005

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

OREN E. CUMMINS,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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PAUL P. O'BRIEN, CLERK

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

OREN E. CUMMINS,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

Jurisdictional Statement.

Jurisdiction of the District Court is based on 28 U. S. C. 1346(a)(2) and this Court has jurisdiction under 28 U. S. C. 1291.

Statement.

On October 18, 1954, Appellee Oren E. Cummins made application for retirement under Section 1(d) of the Civil Service Retirement Act, 5 U. S. C. 691(d) (1952 Ed.). It is not disputed that Appellee had satisfied the length of service and age requirements for such retirement, in fact, neither the Secretary of the Treasury nor the Civil Service Commission gave any consideration to such matters. Nor did either the Secretary of the Treasury or the Civil Service Commission consider "the degree of

hazard to which such officer or employee is subjected in the performance of his duties.” On the contrary, on February 7, 1955, the Secretary of the Treasury, by his delegate, informed Appellee as follows:

“This refers to your letter concerning your eligibility for retirement under Section 1(d) of the Retirement Act.

The Treasury Department negotiated with the Civil Service Commission a list of positions approved for inclusion under Section 1(d). The duties of such positions had to be within the scope of standards furnished by the Civil Service Commission. The position of Internal Revenue Agent, GS-512, in the Audit Division [80] has not been approved for coverage; the position of Special Agent (Tax Fraud), GS-1811, in the Intelligence Division is, however, covered.

As you requested, I am enclosing a list of the positions which have been approved by the Civil Service Commission.” [R. 22-23, 139.]

The position of Internal Revenue Agent, GS-512, in the Audit Division is the grade which was occupied by Appellee. The position of Special Agent (tax fraud), GS-1811 in the Intelligence Division is one of the “covered positions.” [R. 24.]

In a letter dated April 5, 1955, the Secretary of the Treasury, by his delegate, informed Appellee as follows:

“It is mandatory that an employee occupy a position approved for coverage under Section 1(d) at the time he retires in order to have his annuity computed under its provisions. If an employee occupying a covered position needs time spent on detail

from an uncovered position to a covered position to make up the necessary twenty years, such time spent on detail is creditable if properly documented.

Since the position of Internal Revenue Agent, which you occupied at the time you retired, is not approved for inclusion under Section 1(d), you are not, in any case, eligible to have your retirement annuity computed under the provisions of this Section. I am sorry, but we are unable to take any action in your case." (Emphasis supplied.) [R. 24-25, 140.]

In a letter dated March 2, 1955, the Civil Service Commission informed Appellee as follows:

"The office of the Regional Commissioner for the Internal Revenue Service informs us that at the time of your retirement *you were not occupying a position which was approved for inclusion under Section 1(d) of the Retirement Act*, and that no recommendation could therefore be made for your retirement under this Section.

Under the circumstances there is no authority for your retirement under Section 1(d) of the Retirement act." (Emphasis supplied.) [R. 25.]

The reason, and the sole reason, given by the Secretary of the Treasury and the Civil Service Commission for refusing Appellee's retirement under Section 1(d), was that *he was not classified in a position approved for inclusion under Section 1(d)*. No consideration was given to Appellee's personal qualifications for retirement under Section 1(d) but refusal of retirement was predicated entirely on the ground that Appellee was not *classified* in a position where he could be *considered* for retirement under Section 1(d).

Statute Involved.

The statute involved is set out in Appellant's Brief at pages 4-5. We take the liberty of quoting here the last sentence of that section:

"In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee."

Summary of Argument.

Appellee contends it was an error of law for the Secretary of the Treasury and the Civil Service Commission to refuse him retirement under Section 1(d) for the reason that his class of position *was not listed* among those negotiated between the Secretary of the Treasury and the Civil Service Commission. Among the letters informing Appellee of the basis for refusing retirement, was one dated February 7, 1955 (*supra*, p. 2) to which the list of "approved" positions was attached. Appellee maintains that the negotiations between the Secretary of the Treasury and the Civil Service Commission concerning such a listing as well as the promulgation of the list, were in direct defiance of legislative command. The wording of Section 1(d) of the Retirement Act makes it abundantly clear that retirement is not to be determined in any case by giving consideration to the class of the position held by the employee. On the contrary, his retirement is to be decided upon the basis of the duties he performed.

ARGUMENT.

The Secretary of the Treasury and the Civil Service Commission Negotiated a Classification of "Covered" Positions in Defiance of Congressional Mandate.

As Appellant has stated in its Brief, the forerunner of Section 1(d) of the Retirement Act was PL-168. (App. Br. 10.) This section applied only to employees of the Federal Bureau of Investigation. Subsequent to the passage of the section, which provided for special benefits for employees of the Federal Bureau of Investigation, the Treasury Department and other departments of the Government indicated to the Congress that they felt it was unfair to give such preference to enforcement officers in only one branch of the Government. When broader legislation was later being considered by the Congress, the Treasury Department took the view that its enforcement officers should be given the same benefits as those employed in the Department of Justice. For example, we find at page 2276 of the United States Code Congressional Service, 80th Cong., 2d Sess., the following statement:

"Representatives of the Treasury Department pointed out that granting special retirement benefits to law enforcement agents in one agency and not to those in other agencies is discriminatory and inequitable."

At this same time the Acting Secretary of the Treasury wrote to the Congressional Committee and stated among other things:

"The Department favors granting of the proposed retirement benefits to investigative and law enforcement personnel of any Federal agency which can present justification therefor as the Treasury has always done." (P. 2277.)

We should note that the Civil Service Commission was in agreement with the Treasury views and sent a letter to the Congressional Committee in which it stated:

“As has been stated on previous occasions, the Commission is not in favor of special legislation for individual groups of employees.” (P. 2279.)

The Refusal to Retire Appellee Because He Was in an Unlisted Position Was a Pure Error of Law.

The most significant part of the legislative history of Section 1(d) of the Retirement Act is that two separate drafts of the amendment were submitted to the House Committee by the Chief of the Retirement Division. One of those drafts specified the groups of officers and employees who would be eligible for retirement under the amendment, that is, it provided for retirement on the basis of classifications or titles. The other draft did not specify the titles or the classifications but provided that the amendment should apply to *all* Federal officers and employees whose primary duties involved the investigation, apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States. (U. S. C. Congressional Service, p. 2280.) *This latter draft is the one which became Section 1(d).*

Nothing could be clearer than that Congress intended to prohibit the use of a frozen set of classifications of positions. It rejected the draft that set up the qualifications in terms of duties¹ and passed the Bill which specifically said that “in making such determination the

¹It is significant that the list in this rejected Bill is strikingly similar to the one later promulgated by the Secretary of the Treasury and the Civil Service Commission [R. 23, 24].

Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, *rather than the general duties of the class of a position held by such officer or employee.*" (Emphasis supplied.)

Despite this clear mandate from Congress, the Secretary of the Treasury and the Civil Service Commission agreed upon a list of positions which would be covered, and have refused to consider Appellee for retirement because he was not classified under one of the "covered positions." In doing this it is not contended there was an arbitrary determination of facts on the part of the Government officials, because no facts relating to retirement of Appellee were considered. There was merely an error of law in using a list of positions which had been promulgated contrary to legislative enactment. In other words, the Secretary of the Treasury and the Civil Service Commission erroneously interpreted the statute to mean that they could match titles against job classifications to make a mechanical determination of retirement qualifications.

It might be added that while Section 1(d) uses the word "may" in reference to the discretion of Agency officials, there is indication in the legislative history that the Congress intended the provisions to be mandatory. For example, in Senate Miscellaneous Reports, page 1668, 80th Congress, 2d Session, it is stated as follows:

"The Bill provides that the Head of the Department or Agency *shall* make recommendation to the Civil Service Commission when such officer or employee is entitled to retirement and the Civil Service Commission *shall* determine whether or not he shall receive the benefit." (Emphasis supplied.)

Appellee Has Satisfied All Requirements for Retirement Under Section 1(d) and Is Entitled to a Money Judgment.

We should note again that an Internal Revenue Agent (Special Agent) may be retired under Section 1(d) because he is classified under "Positions Covered by §1(d) Retirement Act" [R. 23, 24] and curiously enough, we find that the "Criminal Assignment Squad, New York" which is part of the internal inspection service of the Treasury Department is classified under the covered positions.

No doubt if thought had been given to inclusion of Internal Revenue Agents of the fraud group, they would have been listed as a covered classification. As the testimony amply proves, an Internal Revenue Agent works jointly with the Special Agent in the investigation of persons suspected of offenses against the criminal tax laws of the United States. Much of the evidence in the case is related to the respective duties of the Special Agent and the Revenue Agent. As we have seen, the Special Agent is classified as being eligible for retirement under Section 1(d) while the Revenue Agent is not. The record makes it patently clear that there is no basis for any such distinction. With respect to the duty to investigate persons suspected of tax crimes there is no evidence that Special Agents are subjected to any greater degree of hazard than Revenue Agents who do only fraud investigations. On the contrary, the only testimony in this regard was to the effect that Revenue Agents were subjected to a greater degree of hazard than the Special Agents. [R. 52, 54, 55, 82, 114, 115, 132.]

At the trial the Government argued that a Revenue Agent could not “primarily” be engaged in the investigation of criminal tax fraud because the Special Agent working with him on the joint investigation was the one primarily engaged in the investigation of tax crimes. As the testimony clearly demonstrates, it is *impossible* under the Treasury Rules and Regulations in force during Appellee’s tenure to convict a person for tax evasion without an investigation and report by a Revenue Agent (or deputy collector) in addition to the work of the Special Agent. In every case of criminal tax fraud, a report and computation by a Revenue Agent is necessary before a recommendation of prosecution can be made. As further indication of the Congressional interpretation of the word “primarily” we find the following statement made in a letter from the Chief of the Retirement Division dated April 19, 1948, to the House Committee of Congress. Employees “such as office deputies, marshals and certain post office inspectors” are not considered to be primarily engaged in the investigation of persons suspected of crimes against the United States. (P. 2280, U. S. C. Congressional Service, 80th Cong., 2d Sess.)

As the record shows, there are only a few fraud groups in the United States with considerably fewer than 100 Internal Revenue Agents assigned to such groups. [R. 47.] That is, in only a few offices of the Internal Revenue Service do any of the Internal Revenue Agents work exclusively on fraud cases. Undoubtedly, if the existence of these special fraud groups had been called to the attention of the Civil Service Commission at the time the classifications were set up, the individuals in this group would have been permitted retirement under Section 1(d).

In offices which have no fraud groups, it is customary to have joint investigations conducted by the Special Agents together with regular Internal Revenue Agents. In this way the average Internal Revenue Agent works very few fraud cases. However, Appellee, because of his assignment to the fraud group, was engaged exclusively in the investigation of persons suspected of criminal evasion of tax. [R. 81.]

The only reasonable conclusion we can reach is that the duties of his position were primarily the investigation of persons suspected of criminal tax fraud which entitled him to consideration for retirement under Section 1(d).

Jurisdiction.

Appellant has cited a number of cases which indicate that if this action were in the nature of a writ of mandamus it would have to be brought in the District of Columbia Circuit, since the Secretary of the Treasury and the members of the Civil Service Commission are officials domiciled in the District of Columbia. It is conceded that the United States District Court for the Southern District of California does not have jurisdiction over such administrative officials. This does not mean, however, that officials of these two Departments can erect an iron wall around their determinations which preclude judicial review. Mandamus is not an exclusive remedy.

The question of jurisdiction under the Tucker Act was settled beyond dispute by this Court in *Anderson v. United States*, 205 F. 2d 326. The *Anderson* case cited *Dismuke v. United States*, 297 U. S. 167, in which the Supreme Court ruled squarely that the United States Dis-

trict Court has jurisdiction in this type of case. The Supreme Court there said:

“We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the Government to recover them are within the jurisdiction of the district courts, is not precluded, as the court below held they are, by the administrative provisions of the language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence. *Siberschein v. United States*, 266 U. S. 221; *United States v. Williams*, 278 U. S. 255, or by failing to follow a procedure which satisfied elementary standards of fairness and reasonableness essential to the due conduct of the proceedings which Congress has authorized, *Lloyd Sabaudo Societa Anomina v. Elting*, 287 U. S. 329, but the power of the administrative officer will not in the absence of plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled, *United States v. Laughlin*, 249 U. S. 440; *United States v. Hooslep*, 237 U. S. 1; *McLean v. United States*, 226 U. S. 378. The Commissioner is required by Section 13 ‘upon receipt of satisfactory evidence of the character specified “to adjudicate the claim.” ’ This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it.”

This Court noted in the *Anderson* case that the Supreme Court in the *Dismuke* case referred to the claimant's rights as a "statutory right" and a "statutory benefit." In ruling for the annuitant-claimant, the Court further said:

"The rule stated assumes that the right exists if, at all, prior to and independently of any administrative action upon it."

The Failure to Act on Appellee's Request for Retirement Was Based Upon an Error of Law—Not an Error of Fact.

The Supreme Court in the *Dismuke* case had a problem similar to the one at bar. There the question arose as to whether the plaintiff was or was not an employee of the United States. The Court said:

"The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895, to December 30, 1902, was an employee of the United States. The Administrative determination of that question is open to review in the present suit, and should have been considered and decided by the Court below."
(297 U. S. 172, 173.)

If such a determination raises a question of law, certainly the right of the Secretary of the Treasury to use a classification which automatically prohibits an applicant's retirement raises a question of law.

As previously pointed out whatever rights Appellee had existed prior to the determination made by the Treasury and Civil Service officials. As this Court said in the *Anderson* case:

"Inaction or denial of the claim by the Commission could not delay or defeat the right, and favorable

adjudication, evidenced by issuance of an annuity certificate, could only formally acknowledge a right already established.”

In the *Anderson* case a widow's estate was refused an annuity payment because the widow died before the administrative officials had gotten around to the issuance of a check. On the question of the time at which the widow's rights became fixed this Court said:

“The Court below was of the view that the annuitant can have no right to the annuity until the claim is *adjudicated* by the Commission and a certificate issued. We do not agree. When the annuitant has filed a proper application he has done all that he is required to do. The right must accrue at that time. Cf. *Ewing v. Gardner*, 6 Cir., 185 F. 2d 781, affirming D. C. 88 F. Supp. 315, modified without discussion of this point, 341 U. S. 321, 81 S. Ct. 684, 95 L. Ed. 968. The same Court which rendered the Opinion in *Adams v. Ernst*, supra, on which the Court below and Appellee relied, has held that the right to a statutory gratuity vests at the time satisfactory application is made therefor. *Conant v. State*, 197 Washington 21, 84 P. 2d 378; see also *Finley v. Marion Co.*, 81 Or. 294, 159 P. 557.

If there be doubt as to this construction of the Act, we might consider where the construction urged by Appellee would lead us. Taking the view that the right of an annuitant is conditional upon the Commissioner's *adjudication* of his claim, what would be the effect of a wrongful denial of that claim by the Commission? The answer must be that the annuitant could have no right to the annuity in such event, for the condition would hardly be satisfied by an adjudication that the claim is invalid. And to ac-

cept this argument we must be prepared to say that on claims made under the Act the decision of the Commission is final; for if no right can be asserted by an annuitant after an adverse decision by the Commission, it is the Commission which has the first and last say.

The argument cannot be maintained. On the assumed facts there is no doubt that had Mrs. Anderson lived, and had the Civil Service Commission denied her claim, she could have successfully prosecuted an action for the annuity in the Courts."

This Court had no difficulty in deciding that the administrative determination in the *Anderson* case was based on an error of law which gave the District Court jurisdiction. And so it is here. The administrative officials misinterpreted the provisions of Section 1(d) and used a classification instead of individual consideration of eligibility in rejecting Appellee's application for retirement.

Summary of Judgment.

Appellee, who at the time of application for retirement was over 50 years of age, had rendered more than 20 years of service in a position whose duties were primarily the investigation of persons suspected of offenses against the criminal laws of the United States. Furthermore, he was subjected to a degree of hazard in the performance of his duties contemplated by Section 1(d) and should have been retired under that section upon his request. The refusal of the Secretary of the Treasury and the Civil Service Commission to grant such requirement was based solely upon the reason that Appellee was not in a class of position listed under the heading "Internal Revenue Service positions covered by Section 1(d)

Retirement Act.” No consideration was given to Appellee’s personal qualifications for retirement under Section 1(d) nor did the officials consider the degree of hazard to which Appellee had been subjected. On the contrary, these officials based the refusal for retirement on “the general duties of the class of the position” held by Appellee, contrary to the provisions of Section 1(d). The refusal of the Secretary of the Treasury and the Civil Service Commission to retire Appellee was based upon an erroneous interpretation of the statute. It is therefore submitted that the trial court correctly decided that Appellee was entitled to a money judgment in the sum of \$760.00.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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No. 16013.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BU. PACKARD, INC.,

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 16013.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ABC PACKARD, INC.,

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

In this case Appellant seeks to obtain the reversal of an adverse judgment rendered in a civil action wherein ABC Packard, Inc., a corporation, sought damages for fraud against General Motors Corporation, a corporation.¹

The jurisdiction of the Court of Appeals is believed to derive from Title 28, United States Code, Section 1291,

¹The parties to the appeal will be designated as follows: ABC Packard, Inc., and Anderson Buick Company (the latter being the original corporate name prior to amendment of the Appellant) and M. O. Anderson, its President, principal stockholder and predecessor in interest as "Anderson"; General Motors Corporation as "General Motors"; Buick Motor Division of General Motors Corporation as "Buick."

The Transcript of Record will be indicated by the legend "Tr." followed by appropriate volume and page references; references to portions of the depositions of Harlow H. Curtice, William F. Hufstader, George H. Ruhe and Henry Bauer, read into evidence at the trial, will be indicated by the name of the deponent, followed by the legend "Dep." and appropriate page and line references.

the within appeal being taken from a final decision of the United States District Court for the Western District of Washington, Northern Division.

The jurisdiction of the United States District Court was derived from Title 28, United States Code, Section 1331, in that there is diversity of citizenship, and the amount involved, exclusive of interest and costs, exceeds the sum of Three thousand (\$3,000) Dollars.²

The Complaint [Tr. Vol. I, pp. 3-38] was filed June 30, 1955, and the jurisdictional allegations appear in paragraph II thereof [Tr. Vol. I, p. 6]. The case was tried on an Amended Complaint filed August 12, 1957 [Tr. Vol. II, pp. 396-407] and the jurisdictional allegations appear in paragraph II thereof [Tr. Vol. II, pp. 397-398]. The original Answer [Tr. Vol. I, pp. 39-102] was filed July 25, 1955, and the Answer to the Amended Complaint [Tr. Vol. II, pp. 408-412] was filed August 19, 1957. Paragraph II of the Answer to the Amended Complaint admitted the jurisdictional allegations [Tr. Vol. II, p. 409].

Judgment for defendants upon a jury verdict was entered on January 7, 1958 [Tr. Vol. II, pp. 500-503] and Notice of Appeal filed February 5, 1958 [Tr. Vol. II, p. 528].

²The case arose and was tried prior to the recent amendment to the Judicial Code, increasing the jurisdictional requirement to \$10,000, exclusive of interest and costs. Nonetheless, as appears from the pleadings, the new requirements are satisfied by the action.

Statement of the Case.

The questions involved in this appeal, and the manner in which they are raised, are as follows:

Preliminary.

This is an action by Anderson, a former distributor of Buick automobiles, against General Motors, for damages arising from a fraud resulting in the termination by General Motors of the Anderson distributorship. The claim of fraud proceeds on two theories, either of which would be sufficient to sustain recovery: first, the non-disclosure by General Motors of General Motors' secret policy to terminate the Anderson distributorship when it became more profitable for General Motors to distribute Buick automobiles itself; secondly, misrepresentations made to Anderson by General Motors to the effect that the Anderson distributorship would not be terminated so long as its performance was satisfactory [Tr. Vol. II, pp. 396-407].³

We wish to note at the outset that this is not an appeal on the facts. As more fully appears from the Specification of Errors (this brief, pp. 38-41) only questions of law are presented to the Court. It is the position of Appellant that the relationship of the parties gave rise, in law, to a mutual duty to deal fairly, including a duty imposed by law upon General Motors to disclose to Anderson its secret policy of terminating distributorships. Appellant contends that the trial court erred in submitting to the jury the question of the existence of the duty to disclose. This point was raised

³The quality of Anderson's performance was not in issue at the trial, General Motors having conceded in open court that performance was satisfactory [Tr. Vol. II, pp. 652-653].

in the trial court and an exception specifically saved [Tr. Vol. VI, p. 2243].

To place Appellant's Specification of Errors in its proper context, some factual review is necessary. We propose to rely primarily upon uncontroverted facts, which we believe will demonstrate an extremely close and dependent relationship in which General Motors played a dominant part *vis-a-vis* Anderson, and conversely, the part of Anderson *vis-a-vis* General Motors was one of complete subservience. This relationship can be shown, we believe, through the testimony of General Motors' own officers and employees.

Commencement of the Anderson Distributorship.

Anderson, theretofore a regional manager of Motors Holding Division of General Motors, commenced operations as the distributor of Buick automobiles in the Seattle area in 1936 at the suggestion of William F. Hufstader, then General Sales Manager of Buick [Tr. Vol. V, pp. 1854-1856]. He had not sought the distributorship. Prior to accepting it, he consulted at some length with Mr. Dean, then President of Motors Holding Division, who told him that he viewed the opportunity as a good one and that Anderson need not concern himself about tenure so long as he did a proper job [Tr. Vol. III, pp. 834-837; Tr. Vol. V, pp. 1854-1856].

General Motors' Control of Anderson Policies.

At no time was Anderson permitted to make major policy decisions with respect to the distributorship without consultation and approval of his General Motors' superiors.

The Distributor Selling Agreement provided (Sec. 12):

"Distributor will maintain a place of business including salesroom, service station, parts and accessories

facilities, and used car facilities satisfactory to Seller and will maintain the business hours customary in the trade. Distributor will permit Seller to inspect said place of business at all reasonable times in business hours.

“Distributor will not move to or establish a new location, branch sales office, branch service station or place of business including any used car lot or location without the prior consent of Seller.” [Tr. Vol. I, p. 70.]

Accordingly, whenever it appeared that new facilities should be acquired for the distributorship or that existing facilities should be disposed of, Anderson was required to obtain the advice and approval of responsible General Motors’ officials.

Anderson testified that with one exception he did obtain the advice and approval of responsible General Motors’ officials, as required by the agreement, before acquiring or disposing of any facilities [Tr. Vol. III, p. 867, 868, 955, 956, 1133, 1134].

At the outset in 1936, Anderson consulted Hufstader regarding a location for the distributorship and did not act upon it until Hufstader indicated his approval [Tr. Vol. V, pp. 1857-1859]. In 1946, Anderson cleared with Hufstader plans for improving Anderson’s parts facilities [Tr. Vol. III, pp. 884-885]. The acquisition of the buildings numbered 2 and 3 and of a used car facility were likewise cleared with responsible General Motors’ officials, and in each instance General Motors’ approval was necessary before Anderson undertook action [Tr. Vol. III, p. 952, pp. 1133-1134; Vol. IV, p. 1366]. In the one instance where Anderson expanded facilities without prior approval he was severely censured and was not permitted to use

such facilities until the approval of Albert H. Belfie, Buick General Sales Manager, was obtained [Tr. Vol. V, p. 2022; Tr. Vol. VI, 2052].

The requirement of consultation with General Motors was not confined to the acquisition and improvement of facilities for the distributorship.

Thus, in 1950, when a highly profitable sale of the main facilities for approximately \$850,000 was under consideration, the advice of Mr. Nash, Buick Regional Manager, was sought, and it was made clear to the agent who was to handle the sale of the property that there could be no sale without prior factory approval. Mr. Nash suggested that there should be no sale, and there was none [Tr. Vol. III, pp. 959-962; Vol. V, pp. 1723-1726].

Again, in February, 1951, Mr. Belfie advised against a promotional program then under consideration for the distributorship [Tr. Vol. VI, p. 2093].

In short, no major venture could be undertaken by Anderson without the advice and consent of General Motors. The reasons for this are not difficult to find.

Apart from the personal relationship between M. O. Anderson and his superiors in the Buick organization, it is quite clear from an examination of the General Motors *modus operandi* that General Motors had and exercised virtual control of the Anderson operations. In order to understand the quality and nature of the control, a consideration of the organizational hierarchy or "chain of command" in General Motors, and for present purposes in Buick, is in order.

The Buick "Chain of Command."

The General Motors organization is pyramidal in structure. At the apex is the top corporate command headed from 1952 until recently by Harlow H. Curtice. Subordinate to the top corporate command was the divisional hierarchy. The present case concerns itself with the Buick divisional organization.

At the apex of Buick is its General Manager, a position occupied by Mr. Curtice from 1933 until 1948, and later by Mr. Ivan L. Wiles. Functioning under the General Manager is a General Sales Department, headed by a General Sales Manager. Mr. Hufstader was General Sales Manager from 1933 until 1948, and Mr. Belfie occupied that position at the time of the termination of the Anderson distributorship. Subordinate to the General Sales Manager, in descending order of authority, were assistant general sales managers, regional managers and zone managers or distributors, the latter occupying a position analogous to zone managers, notwithstanding their private ownership. Each zone manager or distributor had a group of dealers in his territory [Curtice Dep. pp. 129-133; Hufstader Dep. pp. 339-341, 343-344].

Anderson as Distributor-Zone Manager.

Anderson, as a Buick distributor, occupied a position analogous to that of a zone manager, working with dealers, obtaining regular reports from them which in turn were forwarded to General Motors, and overseeing the

activities of the dealers in order to assure that they carried out the policies formulated by General Motors.⁴

His functions as a distributor in this regard did not differ materially from those he had occupied for a term prior to undertaking the distributorship [Tr. Vol. III, pp. 828-829, 839-840, 843; Curtice Dep. pp. 232-233; Ruhe Dep. p. 14]. Thus, where dealers functioning under a distributor performed poorly, the distributor would take action just as was the case with zone managers employed directly by Buick in areas where distributors did not operate [Curtice Dep. pp. 232-233; Rude Dep. p. 14, line 15, to p. 17, line 5].

Like a zone manager, Anderson's immediate superior was the regional manager. During most of the period material to the present case, this position was occupied by Mr. Nash, a long term friend and associate of Anderson [Tr. Vol. III, pp. 828, 853-854].

General Motors' Control of Anderson.

Through the foregoing chain of command, Buick completely dominated the activities of Anderson. Such domination was effected through the following means:

⁴The Distributor Selling Agreement provided (Sec. 25):

"A. Appointment

Distributor, after review with Seller, will enter into selling agreements with dealers for the sale of new Buick motor vehicles, chassis, parts and accessories under the jurisdiction of Distributor at such places within the area described in Paragraph First as Distributor shall deem advisable or as Seller may require.

"B. Failure to Appoint

If Distributor fails or neglects to appoint dealers upon request of Seller within three (3) months after such request, Seller shall have the right to appoint dealers at the places designated." [Tr. Vol. I, pp. 82-83.]

A. INSPECTIONS.

The Distributor Selling Agreement required Anderson to permit General Motors to inspect facilities.⁵ Frequent inspections were in fact made.

Mr. Hufstader, as General Sales Manager, inspected the Anderson facilities from time to time [Tr. Vol. V, p. 1862]. In 1948 both Messrs. Hufstader and Curtice inspected the premises [Tr. Vol. V, p. 1872].

Mr. Nash called on the Anderson distributorship approximately every 60 days, inspecting every phase of the operation, interviewing the various department heads so as to obtain an overall picture as to what they were doing, and making "as complete contact as possible with the business." The information thus obtained was passed upward through the Buick chain of command which took such action as the circumstances appeared to warrant. At the same time Mr. Nash passed on to Anderson information received from his superiors, relating to such matters as Anderson's capital requirements, the adequacy of Anderson's facilities, advertising programs and market penetration. It was Nash's duty to discuss with Anderson any deficiencies which might appear. Thus, where certain items of expense appeared to be excessive, Nash would discuss them with Anderson and recommend their elimination [Tr. Vol. V, pp. 1988-1991, 2045-2047; Vol. VI,

⁵Paragraph 21J of the Distributor Selling Agreement provides:

"J. Inspection of Facilities

Distributor will permit Seller to inspect and check over Distributor's service facilities and stock of parts and accessories at any reasonable time in business hours." [Tr. Vol. I, p. 77.]

pp. 2129-2130; Hufstader Dep. pp. 396-399]. In short, Nash and indeed the Buick organization in general were constantly engaged in advising Anderson as to the general conduct of the distributorship.⁶

B. MEETINGS.

Another control device employed by General Motors was the use of meetings in which Anderson was advised by General Motors officials as to the manner in which its operations were to be conducted. At times, such meetings were held locally, at other times distributors were summoned to the Home Office of Buick at Flint, Michigan [Curtice Dep. p. 81; Hufstader Dep. pp. 344-346]. Typical of such meetings was one held in March, 1948, at Seattle, at which Messrs. Curtice and Hufstader spoke to the Anderson organization on the subject of Buick's plans and policies [Hufstader Dep. pp. 532-533].

Through such meetings, as well as by individual contacts through Nash and others, General Motors purported to keep Anderson informed of policies insofar as they affected the operations of the distributor [Curtice Dep. pp. 224-230, 236-237]. They did not, however, inform Anderson of the policy most basic to the distributorship, to wit, the long standing secret policy which ultimately resulted in its termination.

⁶General Motors maintained a Business Management Department which promulgated policy, and a Sales Department which promulgated policy as to sales promotion and advertising. Supervision and control was carried to the extent that General Motors maintained a special department to prepare plans for physical facilities for distributors and dealers [Curtice Dep. pp. 220-222, 224-230].

C. REPORTS.

Another control device employed by General Motors was its insistence upon the furnishing by Anderson of numerous periodic reports setting forth every conceivable detail of operation.

General Motors controlled the inventory of the distributorship by requiring ten-day reports from Anderson as to his own operations and those of his dealers, reporting inventories of new and used cars, deliveries and unfilled orders.⁷

The information thus received was compiled and used to determine future car allotments and as the basis of standing sheets which rated the various zones in terms of their relative turn-over, as a measuring stick of performance⁸

⁷This information was likewise obtained, or verified, by inspection trips of Buick officials. For example, in early 1952 Mr. Ruhe, then regional sales manager, made frequent trips to Seattle, at which time he would consult with Howard Anderson as to his reports and statements. Howard Anderson testified that he felt there were no secrets, and discussed personnel, salaries, wages, and answered all questions put by Ruhe [Tr. Vol. IV, pp. 1382-1383; Ruhe Dep. p. 27, lines 12-13; p. 70, lines 9-15; p. 70, line 22, to p. 71, line 1].

⁸The Distributor Selling Agreement provides:

“2. Handling of Distributor’s Orders

“A. Three Months’ Estimate of Requirements

“Distributor will, unless otherwise advised by Seller, furnish Seller for its general guidance every month, on the date specified by Seller, an estimate, on forms provided by Seller, of his requirements of new Buick motor vehicles and chassis for the three (3) calendar months next following, each month’s estimate to be shown separately.

“B. Ten Day Report

“In order to permit Seller to keep its purchases of raw materials and the production and distribution of Buick motor vehicles and chassis in line with retail sales, Distributor will furnish Seller, every ten (10) days, with a report known as the ‘Ten-day Report’ on standard forms supplied by Seller. Such report shall show retail sales of both new and used cars made during said period, new and used car stocks, and unfilled orders on hand at the end of said period.” [Tr. Vol. I, pp. 55-56.]

[Hufstader Dep. pp. 366-367, 370-371; Curtice Dep. pp. 224-230].

Anderson was required to furnish General Motors with monthly financial statements, sales reports, reports as to the financial condition and physical facilities of the various dealers under his jurisdiction, reports as to his own physical facilities, reports as to enlargement of facilities, and reports dealing with the operation of Anderson's service department, among others.⁹ Likewise, a monthly report was made dealing with the subject of "open points" (*i.e.*, unfilled dealerships) in Anderson's territory.

Each of these reports was submitted on forms prepared by Buick, the information being channeled to the Buick office at Flint either directly or through the Buick chain of command which we have heretofore outlined [Tr. Vol. III, pp. 840-844, 876-879, 999, 1001-1003; Hufstader Dep. pp. 378-381, 474-475].

The information received from such reports, as well as that from other sources (such as car registrations) was used by Buick in various surveys and analyses of the operations of its dealers and distributors [Hufstader Dep. pp. 373-375].

Thus, Buick made market penetration and price class analyses of the operations of its dealers and distributors on a national basis. Where performance fell below national average, this fact was forcibly brought to the attention of the erring zone manager or distributor [Curtice Dep. pp.

⁹The Distributorship Agreement provided (Section 18):

"In furtherance of the purposes, objective, and obligations provided for in this Agreement, Distributor will keep complete and up-to-date records regarding the sale and servicing of new Buick motor vehicles and chassis and will permit Seller at all reasonable times in business hours to inspect such records." [Tr. Vol. I, p. 73.]

230-231, 232-233; Hufstader Dep. pp. 350, 352, 373-374]. In the words of Mr. Hufstader, where, as a result of statistical compilations, it appeared that a particular zone was below average, "an effort would be made to find out where the weakness existed, and then, as I have expressed it many times, lean up against that weakness." The "leaning" function was the responsibility of the person immediately superior to the one whose operations had fallen below the norm; in the case of a dealer, this would be the distributor; in the case of a distributor, the regional manager [Hufstader Dep. pp. 354-355].

Again, the financial statements received from dealers and distributors were composited and studied by the upper echelon of Buick to determine whether the particular business operation was satisfactory to Buick in general [Curtice Dep. pp. 88, 90]. Special studies were made from time to time. The information received was in such form that Hufstader, as General Sales Manager of Buick, could determine from a mere inspection of them any change in the business operations of a distributor, whether it related to profits, physical facilities, assets or any other item [Hufstader Dep. p. 376]. It can be assumed that where such changes displeased him, his displeasure was conveyed to the party responsible for it, and further "leaning" ensued.

In order to facilitate such analyses, Anderson, along with other General Motors distributors and dealers, was required to use a standardized accounting system devised by General Motors¹⁰ [Tr. Vol. III, p. 1083; Tr. Vol. IV, pp. 1442, 1457-1459; Curtice Dep. pp. 223-224].

¹⁰The Distributor Selling Agreement provided (Section 15A):
". . . Distributor will use and keep up to date at all times a satisfactory uniform accounting system designated by Seller and will furnish to Seller, by the tenth of each month, a com-

In short, General Motors required Anderson to furnish it with a mass of information which was composited and carefully analyzed in order to determine whether Anderson was satisfactorily carrying out General Motors' policies. Whenever any deviation from the norm established by General Motors was observed on the part of Anderson or any other dealer or distributor, the offending party would be warned to get in step.

D. GENERAL MOTORS' ZONE MANUAL.

Still another control device employed by General Motors was its "zone manual," which contained various requirements with regard to operational forms and processes, unilaterally devised by General Motors, with which Anderson and other distributors were required to comply. If they ignored the suggestions in the manual, the matter would be called to their attention by Buick's field personnel, the degree of censure depending upon the area of non-conformity [Hufstader Dep. p. 387].

E. ILLUSTRATIONS OF GENERAL MOTORS' CONTROL OF ANDERSON.

Perhaps the best illustration of the use of these highly effective control devices is General Motors' constant pressure on Anderson to increase his working capital. Parenthetically, it should be noted that throughout Anderson's distributorship he considered his working capital sufficient for his own needs [Tr. Vol. V, pp. 1947-1948]. This is ordi-

plete and accurate financial and operating statement with supporting data covering the preceding month's operations, showing the true and actual condition of Distributor's business. Distributor will maintain said system in strict accordance with the Accounting Manual prescribed by Seller." [Tr. Vol. I, p. 72.]

narily the privilege of an independent businessman. Moreover, Anderson never failed to pay prior to delivery for any automobiles which Buick supplied him; in fact, Anderson sought to obtain more automobiles than Buick was willing to supply [Tr. Vol. V, pp. 1947-1948].

Nevertheless, General Motors determined, unilaterally, that Anderson's working capital should be increased in accordance with a nationwide program established by General Motors in 1945 [Tr. Vol. V, p. 1944], and they so advised Anderson [Tr. Vol. III, pp. 913-914, 916-917; Vol. IV, pp. 1364-1365]. Although Anderson replied that he felt his capital structure was reasonably sound [Tr. Vol. V, pp. 1865-1866] Hufstader and his subordinates insisted that Anderson increase his working capital up to the level established for Anderson by General Motors¹¹ [Tr. Vol. III, pp. 894, 906-907]. Constant pressure was exerted on Anderson by written communications and personal contact [Tr. Vol. III, pp. 894, 906-910, 927-932, 964-965; Vol. V, pp. 1863-1864, 1938; Hufstader Dep. pp. 505-506], and finally Anderson was forced to borrow \$500,000 from a lending agency, secured by a mortgage on the Anderson properties, in order to obtain the cash position which Gen-

¹¹The written Distributorship Agreement between Anderson and General Motors provided (Section 14):

"... since Seller has set standards for distributor capital and net worth based on Seller's past experience, Distributor shall establish his own net working capital and net worth in the respective amount and form specified by Seller. If the amount of owned net working capital or net worth or the way in which either is set up is now or hereafter inadequate in Seller's estimation for the proper handling of Distributor's business, Distributor will take the necessary steps to meet Seller's applicable requirements within the time determined by Seller." [Tr. Vol. I, p. 71.]

eral Motors had ordained for him¹² [Tr. Vol. III, pp. 1017-1028; Tr. Vol. IV, pp. 1378-1382; Tr. Vol. V, p. 1799].

Another illustration of General Motors' control of Anderson's policies is found in General Motors' insistence that Anderson provide what General Motors regarded as adequate facilities [Curtice Dep. pp. 76-77]—a requirement which General Motors policed through personal inspection and written reports¹³ [Curtice Dep. pp. 89-90; Hufstader Dep. pp. 325-326, 378-379, 474-475; Tr. Vol. III, pp. 1001-1003]. In line with this policy, Anderson, along with other dealers and distributors, was constantly urged to expand his sales and service facilities [Tr. Vol. V, pp. 2047-2048; Hufstader Dep. pp. 328-329]. In order to insure compliance with the program, Anderson was required to report to Buick on the status of his own physical facilities, as well as those of the dealers under his jurisdiction [Tr. Vol. III, pp. 1001-1003].

On the basis of the information thus received, General Motors prepared surveys which were used to police its policy of requiring Anderson and other distributors to undertake substantial expansion of their physical facilities

¹²The effectiveness of Buick's control over its dealers and distributors is evidenced by the fact that by April 22, 1948, the program was 98 per cent complete nationally [Tr. Vol. III, pp. 916-917; Vol. V, p. 1946].

¹³The Distributor Selling Agreement provided (Section 12):

"Distributor will maintain a place of business including salesroom, service station, parts and accessories facilities, and used car facilities satisfactory to Seller and will maintain the business hours customary in the trade. Distributor will permit Seller to inspect said place of business at all reasonable times in business hours.

Distributor will not move to or establish a new location, branch sales office, branch service station or place of business including any used car lot or location without the prior consent of Seller." [Tr. Vol. I, p. 70.]

[Hufstader Dep. pp. 319-321]. As a further means of forcing compliance with Buick's policy, facilities of various dealers and distributors were frequently inspected [Tr. Vol. V, p. 1862].

Under the constant urging of General Motors, Anderson invested over \$1,000,000 in his facilities during the course of his distributorship, so that his enterprise became, in the words of Buick Sales Manager Hufstader, "housed in magnificent fashion" [Tr. Vol. V, pp. 1955-1956]. Measured by Buick's own standards, Anderson's overall efficiency rating was a high one. Indeed, *it was conceded at the trial that General Motors had no complaint against Anderson's performance during its distributorship* [Tr. Vol. II, pp. 652-653].

The foregoing illustrations are typical of the pattern which was established in the relationship between General Motors and Anderson, a pattern in which General Motors officers acted as overseers of Anderson's operation and guided that operation along policy lines unilaterally laid down by General Motors. At times such guidance assumed the guise of "friendly persuasion," but sterner tactics were employed when necessary, and the threat of force was always present.

The most dramatic illustration of the latter approach involved Anderson's attempt in 1947 to seek re-election to the presidency of the National Automobile Dealer's Association, a nation-wide dealer organization of some 30,000 members. Needless to say, Anderson wished to continue in this office, but Mr. Hufstader, having decided that such was not to be the case, summoned Anderson to Flint and bluntly ordered him not to run for the office. Anderson, subservient to the wishes of his superior, obeyed

Hufstader's order and did not seek election, despite his great desire to do so [Tr. Vol. III, pp. 893-894; Vol. V, pp. 1863-1864, 1938; Hufstader Dep. pp. 543-544].

At times General Motors' control over Anderson was even more open and direct. Thus, during the period from 1936 to 1940, and again from 1942 to 1945, General Motors took direct control of the Anderson operation through its Motors Holding Company subsidiary, then a shareholder, having advanced a portion of the distributor capital. During these periods, Motors Holding held all the voting stock in Anderson and was represented on Anderson's Board of Directors at all times. It was during these periods in which Anderson was operated by Motors Holding Company that many of Anderson's permanent business policies were formulated¹⁴ [Tr. Vol. III, pp. 846-852, 870, 872-873].

Partners in Progress.

The relationship between General Motors and Anderson was an extremely close one.

Thus, Harlow Curtice, General Motors' President and former Buick General Manager, described the relationship as one of "partners in progress," and again as a

¹⁴The subject matters covered included: leases and contracts, insurance, banking, accounting and auditing, discounted notes and contracts, forecast of sales and budget of expenses, maintenance of a surplus, advance to officers and other employees, cash, receivables, company cars, new cars, used cars, parts and accessories, miscellaneous merchandise, prepaid expenses, fixed assets, leasehold and improvements and reserves [Tr. Vol. III, p. 873].

Throughout the period of Motors Holding control, Anderson's minutes were prepared in the Motors Holding office [Tr. Vol. III, pp. 872-873].

partnership "in a business sense."¹⁵ According to Curtice, the relationship between General Motors on the one hand and the dealer or distributor on the other, is a "continuing personal relationship," a "close relationship," a "mutually helpful relationship," and one which is "interdependent." In fact, Curtice testified that "*there is no business in which the relationship is so interdependent*" [Curtice Dep. pp. 200, 201, 202-204, 205-206, 212].

William Hufstader, General Motors vice president and former general sales manager of Buick, likewise testified that an unusual mutuality exists between the automobile manufacturer and its dealers and distributors [Hufstader Dep. pp. 404-405].¹⁶

During his "partnership" with Buick, Anderson devoted his time, efforts and financial resources to carrying out Buick's program in the Pacific Northwest and building

¹⁵The closeness of the relationship between General Motors and Anderson is evidenced by the following language in the distributorship agreement [Tr. Vol. I, p. 53]:

"Third: This is a personal contract, being entered into in reliance upon and in consideration of the personal qualifications of and representations with respect thereto of M. O. Anderson (jointly), the Distributor, or partner(s) in the distributorship, or representative(s) of the Distributor who actively and substantially participate(s) in the ownership and/or operation of the distributorship. The individual or individuals designated shall be responsible for any act or omission of any of Distributor's agents or employees which may be contrary to the purposes and objectives of this Agreement or the obligations of Distributor hereunder. Distributor shall not transfer nor assign this Agreement or any right or obligation hereunder nor make nor suffer to be made any change in the ownership, financial interests or active management of Distributor without the prior written approval of Seller."

¹⁶One of the best illustrations of this "partnership" relationship between General Motors and Anderson is the "Cooperative Advertising Fund" established by Buick and administered by its General Sales Manager. Contributions to the fund were made by Anderson and General Motors for the purpose of advertising to be used in Anderson's territory [Tr. Vol. I, pp. 79-82].

up good will for himself and for Buick's product. His success in taking over an anemic distributorship and building it up to a position where it ranked third in the nation was recognized by General Motors' own officials.

Thus, Hufstader commended Anderson on bringing up Buick's position in his area from the weak position it occupied when he took over the distributorship in 1936 [Tr. Vol. III, p. 761].

Again, O. L. Waller, Hufstader's successor, commended Anderson "for the outstanding cooperation you have given me in carrying out the various programs coming from this office" [Tr. Vol. III, pp. 1010-1011].

Jerome Nash, Anderson's immediate superior, likewise expressed his appreciation for what he termed Anderson's consistently fine performance and cooperation in marketing Buick products [Tr. Vol. III, pp. 854-855].

As a corollary of this "partnership" relation, General Motors recognized that it owed Anderson an obligation to treat him fairly and to deal with him in good faith. Thus, General Motors president Harlow Curtice testified that General Motors was under an obligation to act in good faith toward Anderson [Curtice Dep. pp. 213-214, 215-217, 236] while Hufstader, vice president and former Buick General Sales Manager, testified that good faith is the essence of a successful franchise relationship. According to Hufstader, General Motors' obligation to act in good faith required it to deal fairly with Anderson [Hufstader Dep. pp. 404-405, 408-411, 456].

Of particular importance to the present case is Hufstader's express recognition that by virtue of its good faith obligation, General Motors was bound to notify a distributor such as Anderson of all matters which might

affect the latter's welfare in connection with the performance of his distributorship. Hufstader testified that

“any relationship entered into in good faith has to have a mutuality of understanding, objective, and if it be to the interests of either party that plans be discussed that require the thoughtful application of both, then as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutuality of interest”¹⁷ [Hufstader Dep. p. 414].

General Motors' Dominant Position Vis-a-Vis Anderson.

While Mr. Curtice was correct in likening the General Motors-Anderson relationship to a partnership in terms of its quasi-fiduciary character, by reason of the trust and confidence which Anderson necessarily reposed in General Motors and the closeness of the ties which bound Anderson to General Motors, it is clear that General Motors was the dominant partner, while Anderson occupied a subservient position.

Thus, the written distributorship agreements under which Anderson operated were not negotiated by the “partners” but were unilaterally prepared by General Motors. Periodically, General Motors would herd its distributors together and pass out the printed form of agreement which General Motors had prepared for their signatures [Tr. Vol. III, pp. 1087-1088; Vol. V, pp. 1954-1955; Curtice Dep. pp. 276-277].

¹⁷Subsequent to the transcribing of the deposition, Hufstader added the phrase “in accordance with the terms of the agreement between them.”

Such passive submission on the part of Anderson is hardly surprising, in view of the relative economic positions of General Motors—the nation's largest corporation—and Anderson, one of Buick's three thousand or more dealers and distributors [Curtice Dep. pp. 51-52; Hufstader Dep. p. 317]. The termination by Anderson of his relationship with Buick would hardly have created a ripple in General Motors' vast empire, whereas General Motors' severance of its relations with Anderson would, and in fact did, result in financial ruin to Anderson.

Thus, Anderson recognized at the time he signed the various distributorship agreements that if he failed to sign he would be out of business, his net worth and the market value of his one-purpose fixed assets would depreciate, and it would have been impossible for him to operate his premises at a profit, since no alternative product was available to him which he could market in a volume comparable to Buick [Tr. Vol. III, p. 1095; Vol. IV, pp. 1338-1340; Vol. V, p. 1701]. That Anderson's fears were justified is corroborated by Hufstader's testimony that Buick would not have shipped any automobiles to any dealer who balked at signing the contract submitted by General Motors [Tr. Vol. V, pp. 1954-1955].

Buick's Policy of Terminating Distributorships.

While Anderson was thus carrying out the Buick program and building up good will for what he thought (and had no reason not to think) was a continuing operation, his "partner," General Motors, was in the process of executing a secretly formulated policy which was to culminate in the elimination of Anderson's distributorship. In fact, under that policy, the very success of Anderson's efforts was, unknown to him, bringing about his own destruction.

*The policy in question was one which contemplated the eventual elimination by Buick of all of its distributors, according to a time-table under which various distributors would be eliminated after they had helped establish Buick's position in their area to a point where Buick felt it could carry on more profitably without their services.*¹⁸

The policy was a secret one and, under General Motors' scheme, necessarily so, because the General Motors' officials who formulated the policy obviously recognized that unless a distributor were kept in ignorance of his forthcoming extinction he could not be induced to expand his facilities (and with it the market for General Motors' products in his area), thereby bringing nearer the date of his own destruction.

The origin of that policy, as revealed by the testimony and correspondence of certain key Buick officials, particularly Curtice¹⁹ and Hufstader,²⁰ dated back to the pre-World War II period. Thus, Harlow H. Curtice, former Buick General Manager, wrote in 1954:

"I am quite familiar with the policy of Buick Motor Division to the effect that it would handle its wholesale distribution through Divisional Zone Offices directly with its dealers, and the program for carrying

¹⁸For convenience, we shall refer to this policy hereafter as "Buick's Distributorship Termination Policy."

¹⁹Curtice was appointed General Manager of Buick in 1933, General Motors' Vice President in 1948 and President of General Motors in 1953. He has been a Director since 1940, and a member of the Administrative and Operations Policy Committees of the Board since 1946, the latter committee having charge of the operations of the corporation, such as the manufacture, design and sale of the product, research and distribution [Curtice Dep. pp. 7, 9, 10, 11-13].

²⁰Hufstader was appointed General Sales Manager of Buick in 1933 and Vice President of General Motors in Charge of the Distribution Staff in 1948 [Hufstader Dep. p. 292].

out that policy which neared completion in 1953 with the discontinuance of the Buick distributorships and the replacement thereof with zone operations in the Pacific Northwest, since I, as General Manager of Buick Motor Division approved that policy and actively participated in the effectuation of it over a period of years in different sections of the country"²¹ [Tr. Vol. V, pp. 1956-1958].

Curtice testified that during the years immediately preceding World War II (1937-1941), he and Hufstader, then General Sales Manager of Buick, discussed on numerous occasions the matter of substituting factory zone operations in place of private distributorships [Curtice Dep. pp. 137-141, 142-143, 145-146, 149-151]. Commencing in 1937 or 1938 various studies and surveys were made at the instance of Curtice and Hufstader, comparing the cost of private distributorships²² with the estimated cost of direct factory distribution [Tr. Vol. V, pp. 1960-1962; Vol. VI, pp. 2204-2205]. Curtice testified that actually such studies were not essential in view of the fact that both Curtice and Hufstader knew all along that as production and sales increased Buick would replace its private distributors with direct factory zone operations [Curtice Dep. pp. 139-140].

Mr. Belfie, who conducted certain studies which led to the establishment of private distributorships in the Pacific Northwest, testified that he was aware at about the time

²¹Hufstader's testimony is to the same effect, although he quibbled over the use of the word "policy," apparently preferring the word "program" although he eventually conceded that he regarded the words "program" and "policy" as synonymous in the present context [Tr. Vol. V, pp. 1958-1959].

²²Anderson was not advised that such surveys were being made [Tr. Vol. V, 1960].

the Anderson distributorship was established that it was Buick's intention to terminate private distributorships and substitute factory zone operations in their place, and that Jerome Nash, Pacific Coast Regional Manager for Buick and Anderson's immediate superior, was probably aware of the program, although neither Belfie nor Nash ever advised M. O. Anderson or any one in the Anderson organization of this fact [Tr. Vol. VI, pp. 2056-2057, 2071, 2124-2125; Vol. V, pp. 1950-1951].

Commencing in 1944, Buick set about methodically to execute its policy of eliminating its "partners in progress" as soon as it became profitable to General Motors to do so [Curtice Dep. pp. 149-151].

From 1936 to 1944, there were eight Buick distributorships: Noyes in Boston, Howard in California, Garber in Saginaw, and five distributorships, including Anderson, in the Pacific Northwest [Tr. Vol. V, pp. 1920-1921; Curtice Dep. pp. 129-133].

The first step in the execution of Buick's program was the elimination of Noyes in 1944.

The second step was the elimination of Howard in 1947.²³

What Curtice describes as the "third step" was the elimination of the five Northwest distributorships, including Anderson, in 1953 [Curtice Dep. pp. 145-146].

The execution of this "third step" actually began in September, 1951, at which time Ivan Wiles, Buick General Manager, and Albert Belfie, Buick Sales Manager, decided

²³Hufstader testified that he told Howard in 1944 that General Motors had decided to terminate his distributorship and that upon termination Buick would take over the Howard territory as a zone operation [Hufstader Dep. pp. 482-483].

that the Northwest distributorships appeared “ripe” for “harvesting” by Buick. Accordingly, at their direction, Mr. Wilcox of General Motors made certain studies comparing the projected cost of a factory zone with distributor overrides in the Pacific Northwest, this being the amount whereby zone operation would be less expensive for Buick than private distributor operation. The study originally showed an excess of override over estimated expenses of \$171,000.00. Subsequently, about April 1, 1952, the study was revised so as to indicate an excess of nearly \$184,000.00 and it was decided that the time had come under Buick’s long-established but undisclosed policy to establish a direct factory zone in the Pacific Northwest [Tr. Vol. VI, pp. 2095-2096, 2134-2139, 2197].

In March or April of 1952, Belfie advised Hufstader of his plans to advise the Northwest distributors that their distributorships were to be terminated, effective July 1, 1953. Hufstader stated that this was in keeping with the program [Hufstader Dep. pp. 558-560]—an obvious reference to the general policy which he and Curtice had developed during the pre-World War II period, under which the Noyes and Howard distributorships had already been eliminated. Subsequently, Hufstader discussed the matter with Ivan Wiles, Buick General Manager, who likewise indicated that the time for terminating the Pacific Northwest distributorships was at hand [Hufstader Dep. p. 562].

General Motors’ Failure to Disclose.

While General Motors was thus carrying out its policy of eliminating Buick distributors, it never disclosed that policy, or Buick’s termination of the Noyes and Howard distributorships pursuant thereto, to its “partner” Anderson [Curtice Dep. pp. 149-151; Tr. Vol. III, pp. 889-892;

Vol. IV, p. 1386; Vol. V, pp. 1967-1971; Hufstader Dep. pp. 499, 541, 601; Tr. Vol. VI, pp. 2056-2057, 2071, 2124, 2064-2065] and this despite the fact that:

(1) *Various General Motors officials, including Hufstader, who had formulated the policy, and Belfie, who concededly was aware of its existence, had numerous contacts with Anderson during this period, in the course of which they discussed other aspects of Buick's plans for the future, as well as Anderson's own plans to expand his facilities* [Tr. Vol. III, pp. 904, 956; Vol. V, pp. 1967-1971; Curtice Dep. p. 151; Hufstader Dep. pp. 496, 500-501, 531], and

(2) *Jerome Nash, Anderson's "friend" and immediate superior, had written to Anderson in May, 1948: "I will write you from time to time and visit about matters of importance as it affects Buick and Anderson Buick, and will always try to keep you well informed how things are going" [Tr. Vol. VI, pp. 2053-2056]. By this Nash meant, according to his own testimony, that he would advise Anderson how things were trending in Anderson's relation with Buick* [Tr. Vol. VI, pp. 2053-2056].

**General Motors' Representations as to Long-Range
Nature of Anderson's Distributorship.**

On the contrary, Anderson's superiors in General Motors were constantly speaking in terms of the "long-range" nature of the franchise.

Thus, in April, 1943, Nash wrote Anderson: "Buick will need the staunchest kind of people to do business with after this war is over, and we will have them in our key outlets" [Tr. Vol. III, pp. 864-865]. Again, in 1945, Nash advised Buick distributors that an expansion of facilities would be fully justified, although Nash testified

that such expansion would not have been justified on a short-term basis [Tr. Vol. III, pp. 883-884; Vol. V, pp. 2047-2048].

Likewise, in June, 1950, Belfie, who at the time was admittedly aware of Buick's termination policy and was soon to become instrumental in carrying it into execution by eliminating the Northwest distributorships, wrote Anderson of the cooperation of Buick dealers in carrying Buick to greater heights [Tr. Vol. III, p. 1012].

Again, William Hufstader, then Buick Sales Manager, in approving Anderson's "Pledge to New Car Buyers," referred to it as excellent merchandising over the "long pull" [Hufstader Dep. pp. 526-527].

Moreover, General Motors' President Harlow Curtice testified that the relationship between General Motors and the vast majority of its dealers has been a continuing, long-range relationship, a majority receiving their renewals annually, and that the dealers had come to understand it as such [Curtice Dep. pp. 157, 158-159, 162, 166].

As further evidence of the long-term nature of Anderson's distributorship, General Motors provided special training courses for Anderson's sons, along with the sons of other dealers and distributors, covering all phases of dealership management [Tr. Vol. IV, pp. 1359-1360; Hufstader Dep. pp. 393, 395-396].

Whenever Anderson evidenced any concern to his superiors as to the duration of his distributorship, his mind was quickly put at rest.²⁴

²⁴Such inquiries were in fact curtailed by Buick's Sales Manager, Belfie, in the fall of 1951 when he severely criticized Anderson for discussing sales policies with Mr. Wiles, Buick's General Manager. At the time, Belfie advised Anderson that he was never to discuss sales policies with anyone but Ruhe (Nash's successor as Pacific Regional Manager), Nash, or Belfie [Tr. Vol. III, pp. 1012-1015; Vol. V, p. 1914].

Thus, in 1947, Anderson, having heard a rumor that the Howard distributorship in California had been terminated, phoned Nash in San Francisco, told him he was disturbed by the rumor, and inquired as to its truth. Nash confirmed the truth of the rumor but told Anderson not to be disturbed. Nash emphasized the importance of keeping the matter confidential so as not to disconcert the other Northwest distributors²⁵ [Tr. Vol. V, pp. 2004-2005; Vol. VI, pp. 2066-2069].

Anderson testified that he expressed concern to Nash regarding a projected expansion of Anderson's facilities and that Nash replied that the Howard distributorship was terminated because they had not done an adequate job in obtaining market penetration for Buick, but this did not apply to Anderson. Anderson testified that Nash assured him that Anderson should go ahead with his program, as there was nothing to worry about as long as Anderson continued to do a proper job, and that he (Anderson) had implicit faith in what Nash told him [Tr. Vol. III, pp. 895-902].²⁶ Nash testified that he told Anderson "This does not concern you" and that he felt he had put Anderson's mind at rest [Tr. Vol. V, p. 2004; Tr. Vol. VI, p. 2069].

Again, in 1951, when Anderson was considering borrowing \$500,000 secured by a long-term mortgage on his

²⁵These other distributors were later to be victims of Buick's secret policy.

²⁶Anderson testified that in approximately 1947 he told Nash that he thought General Motors' change from distributorship contracts of indefinite duration to contracts of one-year duration was unusual, but Nash assured him he had nothing to worry about as long as he did a satisfactory job [Tr. Vol. III, pp. 1092-1093]. Similar assurances had been given to Anderson at the time he undertook the distributorship in 1936 (see p. 4, *supra*).

premises in an effort to meet the working capital requirements established for him by General Motors, Anderson consulted General Motors regarding the permanency of his distributorship. According to the testimony of M. O. Anderson and his son Howard, they met with Nash and Ruhe²⁷ of General Motors on November 9, 1951, in San Francisco, and sought the advice of the latter before taking on the obligation. Anderson stated that he wanted some assurance that he would have sufficient time under the distributorship to pay off the mortgage. Anderson indicated some concern because of the termination of the Howard distributorship, but Nash explained that Anderson's situation was different than Howard's, because Howard had not been doing an adequate job, whereas Anderson had a very fine operation. Nash told Anderson he did not have a thing to worry about in terms of getting the mortgage repaid and indicated his approval of Anderson's plans to improve his capital position. Anderson then telephoned the representative of the lending agency and indicated his willingness to go ahead with the mortgage and subsequently executed a 15-year mortgage for \$500,000 [Tr. Vol. III, pp. 1017-1028; Vol. IV, pp. 1378-1382; Bauer Dep. pp. 3, 4, 14-16, 17]. While Nash's testimony as to the 1951 meeting differs in some respects from that of Anderson, Nash did acknowledge that the meeting took place and that Anderson told of his negotiations in connection with the \$500,000 loan [Tr. Vol. V, pp. 2007-2010; Vol. VI. p. 2076].²⁸

²⁷In June, 1950, Nash was promoted to Assistant General Sales Manager, with George Ruhe succeeding Nash as Pacific Regional Sales Manager [Ruhe Dep. p. 8, lines 14-19; p. 13, lines 1-17].

²⁸Ruhe testified that at the San Francisco meeting, Anderson informed Nash and Ruhe of the \$500,000 mortgage loan which Anderson said would enable him to meet General Motors' demands as to Anderson's working capital [Ruhe Dep. p. 73, line 11, to p. 74, line 1; p. 75, lines 8-16].

Anderson's Reliance on Long-Range Nature of
Distributorship.

It is not surprising, therefore, to find that Anderson believed that his distributorship would be continued as long as he achieved satisfactory market penetration and did a satisfactory job for Buick, and that Anderson invested substantial sums in reliance upon that belief [Tr. Vol. V, pp. 1633-1634].

Anderson testified that had he known of Buick's Distributorship Termination Policy, among other things he would not have purchased the stock of the Westlake Corporation, which owned the premises he was leasing, in 1944, nor would the Anderson Company have acquired the stock in 1947. Neither would Anderson have acquired a lot for \$40,000 in the latter part of 1945 nor constructed Building Number 3 on the lot for \$275,000, nor would he have made the \$500,000 mortgage loan. Neither would he have advertised on the scale he did if he had known that Buick planned to terminate his distributorship before that advertising bore fruit [Tr. Vol. III, pp. 956, 957, 1027-1028, 1037-1038, 1062-1063]. The record is replete with instances reflecting reliance to Anderson's detriment.

General Motors' Termination of Anderson's Distributorship.

In July, 1952, the effects of General Motors' secret Distributorship Termination Policy, though not the policy itself, were brought home to Anderson when, in a meeting of distributors called by General Motors in Portland, Belfie announced that Buick's five distributorships in the Pacific Northwest area were to be terminated as of June 9, 1953, with Buick taking over the area as a direct factory

zone operation, which Buick did in fact do on approximately the latter date [Tr. Vol. III, pp. 1046-1047; Vol. VI, pp. 1383-1384; Vol. V, pp. 2011-2012; Vol. VI, p. 2097; Ruhe Dep. p. 18, line 11, to p. 19, line 8]. Even then, however, Anderson was not advised of the secret policy which had thus culminated in the elimination of his distributorship.

Anderson's Discovery of General Motors' Distributorship Termination Policy.

In fact, the existence of such a policy was not brought home to Anderson until October of 1953, at which time Hufstader let the "cat out of the bag" by explaining to an inquiring stockholder that the termination of Anderson was merely one step in effectuating Buick's long-range policy of eliminating distributorships. Hufstader wrote:

"Prior to the war, it became apparent to the car divisions of General Motors Corporation which operate through zone officers, as it had with other manufacturers, that with a large volume of production in an increasingly competitive market with all the problems incident thereto, the wholesale distribution of cars could best be handled by factory representatives and zone operations in many of the areas in which distributors were operating. Before any study was completed the war intervened. Subsequently, the matter was given further consideration and these car divisions have, over a period of time in the post-war years, consistently followed the practice of eliminating distributorships and undertaking the wholesale operations where circumstances would indicate such action to be beneficial from a distribution and service standpoint.

“The elimination of the Buick Motor Division distributors in the Pacific Northwest represents the final transaction undertaken by Buick under this practice” [Tr. Vol. III, pp. 1070-1073; Vol. V, p. 1877; Pltff’s Ex. No. 81].

As heretofore indicated, prior to seeing this letter, Anderson had never been informed by Nash, Belfie, Curtice, or anyone else of the plan referred to in the letter [Tr. Vol. III, pp. 1070-1075].

Proceedings in the Trial Court.

Subsequently, on June 30, 1955, Anderson commenced the present action. The Complaint in its final form [Tr. Vol. IV, p. 1342; Vol. II, pp. 396-407] set forth two claims, both sounding in fraud, the first based upon General Motors’ non-disclosure to Anderson of its policy regarding termination of distributorships, the second premised on Nash’s 1947 and 1951 representations to Anderson to the effect that Anderson’s distributorship would not be terminated arbitrarily.

During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson’s claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574]. The Court likewise dismissed as to M. O. Anderson individually [Tr. Vol. V, pp. 1713-1718]. The remaining issues were submitted to the jury.

Plaintiff requested the Court to instruct the jury that the relationship between General Motors and Anderson gave rise to a duty of mutual trust and confidence in their business dealings, by virtue of which General Motors was under a duty to disclose to Anderson material facts that were peculiarly within the knowledge of General Motors,

and of which plaintiff was ignorant²⁹ [Tr. Vol. II, p. 415]. The Court denied plaintiff's request, stating [Tr. Vol. II, p. 415]: "I have determined that the relationship is an issue of fact which should be submitted to the jury for its determination and finding."

The Court directed the jury to answer some 28 questions formulated by the Court in addition to rendering a general verdict.³⁰

The questions submitted and the jury's answers thereto were as follows [Tr. Vol. II, pp. 500-503]:

"1. On November 9, 1951, did Jerome B. Nash in words or substance state and represent to M. O. Anderson that Anderson Buick Company need not concern itself about termination of its distributor-

²⁹Plaintiff's proposed Instruction No. 3 was as follows [Tr. Vol. II, p. 415]:

"You are instructed that the relationship between the defendant General Motors Corporation as manufacturers and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant."

³⁰Plaintiff objected to the submission of such special questions

"on the ground that they are too numerous and lengthy and detailed and because of their large number, now just described, they, in effect operate to deprive the Plaintiff a fair hearing of the issues covered in great detail in the instructions" [Tr. Vol. VI, pp. 2363-2364].

Plaintiff asserted that

"a general verdict in light of the detailed instructions would adequately and fairly protect the rights of the parties, whereas the submission to the jury of these numerous interrogatories represents an excessive burden upon the plaintiff in the fair and expeditious determination of the issues created by the pleadings and resulting from the proof of the issues in this case" [Tr. Vol. VI, pp. 2363, 2364].

ship as long as it continued to penetrate the market and maintain price class performance and for at least so long a period as was required to amortize the \$500,000 mortgage?

Answer: No.

2. Was the making of such a statement within the scope of the authority of Jerome B. Nash?

Answer: No.

3. Did General Motors during the period 1937-1941 formulate and adopt a policy which in substance provided for the termination of the distributorship of Anderson Buick Company after it had developed the market for Buick automobiles, parts and accessories in the territory assigned to it to a point when it would be more profitable for General Motors itself to distribute?

Answer: No.

4. *Did General Motors have such a policy on November 9, 1951?*

Answer: *Yes.*

5. Did General Motors continuously have such a policy for the period from 1941 to July 10, 1952?

Answer: No.

6. If you have found that this statement of Jerome B. Nash was made on November 9, 1951,

A. Was the statement true or false?

B. Did Anderson Buick Company believe the statement to be true?

C. Did Anderson Buick Company act in reliance upon the statement?

D. Was it reasonable for Anderson Buick to act in reliance upon it?

E. Did Anderson Buick Company sustain damage as a result of such reliance and action?

F. In that event what was the amount of such damage?

Answer: (Questions not answered.)

7. *Was the relationship between Anderson Buick Company and General Motors Corporation such a relationship as required the disclosure of such a policy, if you have found that there was such a policy, by General Motors to Anderson Buick Company?*

Answer: No.

8. *If you have found that there was such a policy of General Motors was that policy known to Anderson Buick Company or should it have been known to Anderson Buick Company in the exercise of ordinary business prudence?*

Answer: No.

9. (a) Did Anderson Buick Company take action in ignorance of a matter which General Motors was required to disclose to Anderson Buick Company because of the relationship between Anderson Buick Company and General Motors?

Answer: No.

(b) Did Anderson Buick Company sustain damage as a result of such action?

Answer: (Question not answered.)

(c) What was the amount of such damage, if any, which Anderson Buick Company so sustained?

Answer: (Question not answered.)

10. A. With respect to the annual agreements, were the following agreements executed by Anderson Buick Company because of business compulsion as that term has been defined for you. Answer Yes or No with respect to each separate agreement dated—

I. November 1, 1947. Answer: No.

- II. November 1, 1949. Answer: No.
- III. November 1, 1949. Answer: No.
- IV. November 1, 1950. Answer: No.
- V. November 1, 1951. Answer: No.
- VI. November 1, 1952. Answer: No.

B. With respect to the annual agreements, answer with respect to each of the agreements listed here, whether plaintiff signed them because of a non-disclosure of a matter which General Motors was required to make to Anderson Buick Company. Answer Yes or No with respect to each separate agreement dated—

- I. November 1, 1947. Answer: No.
- II. November 1, 1949. Answer: No.
- III. November 1, 1949. Answer: No.
- IV. November 1, 1950. Answer: No.
- V. November 1, 1951. Answer: No.
- VI. November 1, 1952. Answer: No” (emphasis added).

The jury’s general verdict was in favor of defendant General Motors [Tr. Vol. II, p. 443]³¹ and judgment was entered thereon [Tr. Vol. II, pp. 500-503]. Thereafter, plaintiff moved for a new trial [Tr. Vol. II, pp. 450-462], said motion was denied [Tr. Vol II, p. 504] and the present appeal was taken [Tr. Vol. II, p. 521].

Plaintiff filed objections to the cost bill submitted by defendants [Tr. Vol. II, pp. 467-470]. Among the items

³¹The Court had under consideration a motion by defendant to dismiss as to ABC Packard Inc. [Tr. Vol. V, pp. 1713-1718]. After the jury had rendered its verdict, the Court indicated that it was in accord with the jury’s findings and that it was granting defendant’s motion [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479]. However, the Court subsequently entered judgment on the jury verdict [Tr. Vol. II, pp. 500-503] and we have so treated the judgment on the present appeal.

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to \$2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

Specification of Errors.

I.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT GENERAL MOTORS OWED ANDERSON A DUTY TO DISCLOSE AS A MATTER OF LAW.

Plaintiff requested the Court to instruct the jury as follows:

“You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to; disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant” [Tr. Vol. II, p. 415].

The Court denied plaintiff's request, explaining that in the Court's view this was a matter for determination by the jury [Tr. Vol. II, p. 415].

It is submitted that the Court erred in failing to determine as a matter of law the existence of a duty on the part of General Motors to disclose its Distributorship Termination Policy to Anderson and in failing to instruct the jury accordingly, as requested by plaintiff.

II.

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY ANDERSON'S CLAIM BASED ON NASH'S 1947 REPRESENTATIONS TO ANDERSON.

Among the grounds upon which Anderson sought recovery were certain representations made by Jerome Nash to Anderson in 1947 to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered proper performance [Tr. Vol. II, pp. 403-404]. During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson's claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574].

It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VERDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

"I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to \$2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

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It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VERDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

"I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

in dispute was the cost of preparing a reporter's transcript [Tr. Vol. II, p. 469]. This item, amounting to \$2,202.05, was disallowed by the Clerk [Tr. Vol. II, pp. 495-496], but was subsequently allowed by the Court on defendants' Motion to Retax Costs [Tr. Vol. II, pp. 504, 527].

Specification of Errors.

I.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT GENERAL MOTORS OWED ANDERSON A DUTY TO DISCLOSE AS A MATTER OF LAW.

Plaintiff requested the Court to instruct the jury as follows:

"You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof. Such a duty includes the duty of General Motors Corporation to; disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant" [Tr. Vol. II, p. 415].

The Court denied plaintiff's request, explaining that in the Court's view this was a matter for determination by the jury [Tr. Vol. II, p. 415].

It is submitted that the Court erred in failing to determine as a matter of law the existence of a duty on the part of General Motors to disclose its Distributorship Termination Policy to Anderson and in failing to instruct the jury accordingly, as requested by plaintiff.

II.

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY ANDERSON'S CLAIM BASED ON NASH'S 1947 REPRESENTATIONS TO ANDERSON.

Among the grounds upon which Anderson sought recovery were certain representations made by Jerome Nash to Anderson in 1947 to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered proper performance [Tr. Vol. II, pp. 403-404]. During the trial, the Court ruled, as a matter of law, that Anderson could not recover for any representations made by Nash in 1947, and the jury was therefore precluded from considering Anderson's claims in this regard as an independent basis of relief [Tr. Vol. IV, pp. 1573-1574].

It is submitted that the Court erred in taking from the jury the issue of Anderson's right to recover for Nash's 1947 representations.

III.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AND MOTION TO DISMISS PLAINTIFF'S ACTION FOLLOWING THE VERDICT OF THE JURY [Tr. Vol. II, p. 444; Vol. VI, pp. 2468-2479].

IV.

THE COURT ERRED IN INSTRUCTING THE JURY THAT ANDERSON WAS PRECLUDED FROM CLAIMING THAT HE SIGNED THE DISTRIBUTORSHIP AGREEMENT OF NOVEMBER 1, 1952, BECAUSE OF GENERAL MOTORS' NONDISCLOSURE OF ITS DISTRIBUTORSHIP TERMINATION POLICY.

The Court instructed the jury as follows:

"I charge you that since the final agreement of November 1, 1952, was entered into after July 10, 1952—the date of the Portland meeting—there may

be no claim by plaintiff that this agreement was signed in reliance upon the alleged misrepresentation or because of the alleged nondisclosure” [Tr. Vol. VI, pp. 2419-2420].

The plaintiff excepted to the foregoing instruction as follows [Tr. Vol. VI, p. 2243]:

“Mr. Horowitz: Referring now to Section IX of Court’s Exhibit 1, on page 9 thereof, being the second sentence in the second paragraph of that page, commencing with the words, ‘I charge you that since the final agreement of November 1, 1952,’ and ending with the words, ‘of the alleged nondisclosure,’ I except to the giving of that portion of the charge in that it deprives the plaintiff of the right to claim that the signing of the November 1st, 1952 agreement was made in ignorance of the knowledge of the fraud, either that the misrepresentation was fraudulently made, referring now to the misrepresentation of November 9, 1951, and November, 1947, and knowledge that there was (2423) a fraudulent nondisclosure, by stating as a matter of law that there may be no claim by the Plaintiff that this agreement was signed in reliance upon alleged misrepresentation, or because of the alleged nondisclosure the Plaintiff is deprived of an opportunity to contend that at the date of the signing of the November 1st, 1952 contract he did not have the knowledge which he acquired on October 23, 1953, when for the first time he was made aware of the policy of terminating distributors as therein set forth.

The Court: Your exception is noted upon the record.

I decline to alter, change or modify that charge with reference to the agreement of November 1st, 1953. You have the exception noted upon the record.”

V.

THE COURT ERRED IN AWARDING GENERAL MOTORS AS AN ITEM OF COSTS COURT REPORTER'S FEES FOR PREPARING A TRANSCRIPT OF THE PROCEEDINGS AT THE TRIAL.

Among the items included in General Motors' cost bill was the cost of preparing a transcript of proceedings at the trial [Tr. Vol. II, p. 464]. Anderson filed formal objections to the inclusion of this item, on the ground that the cost of a Reporter's Transcript is not properly recoverable as costs under either the local court rule or general practice where, as in the instant case, the transcript is not ordered by the court but is prepared for the benefit of the defendant [Tr. Vol. II, pp. 469, 473].

The Clerk, in taxing costs, refused to allow this item [Tr. Vol. II, pp. 495-496], but the trial court, on General Motors' Motion to Retax Costs, permitted General Motors to recover the cost of the transcript [Tr. Vol. II. p. 504], and in so doing committed error which should be rectified by this Court.

Summary of Argument.

The principal issue on this appeal is whether the court should have determined, as a matter of law, that General Motors owed Anderson a duty to disclose General Motors' Distributorship Termination Policy. The failure of the Court to determine this issue, as requested by plaintiff, was of decisive importance because the jury's special verdicts, amply supported by the evidence, established all of the remaining elements of Anderson's cause of action, namely, (1) that General Motors had a policy of terminating distributorships whenever it became more profitable to General Motors to do so, (2) that General Motors failed to disclose that policy to Anderson, and (3) that Anderson was not chargeable with knowledge of that policy. It is

likewise clear that Anderson suffered damages as a result of such non-disclosure. Therefore, if the Court had determined that General Motors had a duty to disclose to Anderson its Distributorship Termination Policy, the judgment below would have been in favor of Anderson rather than of General Motors.³²

It is the position of appellant that, in light of the nature of the relationship existing between General Motors and Anderson, the Court below should have determined that General Motors was, as a matter of law, under an obligation to disclose to Anderson its Distributorship Termination Policy.

At the outset, it should be noted that the question whether a duty to disclose exists in a given case is one for determination by the court, rather than the jury, for the duty of disclosure is not one which a party voluntarily assumes, but is *an obligation which the law imposes upon him as a consequence of his relationship to the party toward whom the duty is owing*. Accordingly, the Court below should have considered the nature of the relationship between General Motors and Anderson in order to determine whether a duty to disclose existed. Such a consideration could lead to no other conclusion than that

³²In view of the fact that the court submitted 28 questions to the jury, and gave instructions to the jury which consumed over 50 pages of printed transcript, it is surprising that the jury was able to arrive at a verdict at all. It is even more notable that the plaintiff was able to obtain a favorable determination by the jury on all but one of the numerous issues submitted to the jury on plaintiff's non-disclosure theory [Tr. Vol. VI, pp. 2374-2428; 2459-2466].

General Motors was, as a matter of law, under an obligation to disclose to Anderson its Distributorship Termination Policy.

First of all, the relationship of a manufacturer to his distributor is generally recognized as including incidents of the principal-agency relationship, including an obligation on the part of the manufacturer-principal to disclose to his distributor-agent all matters pertinent to the agency. Regardless how the manufacturer-distributor relationship is classified, however, the courts have recognized that such a relationship imposes upon each party an obligation to deal with the other in good faith, including, of course, an obligation to make full disclosure of material facts.

It is not necessary, however, to rely solely upon the general rule governing the manufacturer-distributor relation, because it is clear that the particular relationship with which we are here concerned was such as to impose upon General Motors, as a matter of law, a duty to make full disclosure to Anderson of General Motors' Distributorship Termination Policy. This follows from the fact that Anderson, while nominally independent, was, in reality, under the complete domination and control of General Motors. Through such control devices as personal inspections, written reports, meetings and zone manuals, General Motors kept Anderson's entire operation under the closest possible scrutiny in order to insure that Anderson carried out the policies which General Motors unilaterally established for him. Anderson, in turn, was required to obtain the approval of his General Motors' superiors be-

fore undertaking any business venture. Such complete subservience to General Motors on the part of Anderson is readily understandable, of course, in light of the constant threat of economic ruin with which Anderson was faced in the event he were to disobey the commands of his General Motors superiors. Under such circumstances, it is not surprising to find that General Motors was able to compel Anderson to increase his working capital, in accordance with General Motors' master plan, by borrowing \$500,000 from a lending agency, although such an increase was not necessary from the standpoint of Anderson's own operation.

As a corollary of General Motors' domination and control of Anderson, and the resulting trust and confidence which Anderson reposed in his General Motors superiors, *General Motors had a duty as a matter of law to disclose to Anderson all matters of importance affecting his distributorship.* In fact, Anderson's superiors in the General Motors organization appeared to recognize their obligation in this regard, *albeit* they did not fulfill it with respect to the matter at issue.

Nevertheless, when Anderson's superiors in General Motors had formulated a policy under which they planned to eliminate Anderson's distributorship as soon as it became profitable to do so, they failed to disclose this fact to Anderson, but instead encouraged him to invest substantial sums in his distributorship, from which they knew he would never have an opportunity to reap the harvest to which he was entitled.

(See also topical index)

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

I.

The Court Erred in Failing to Instruct the Jury That General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose Its Distributorship Termination Policy.

- A. If, as Plaintiff Contends, There Was a Duty to Disclose as a Matter of Law, the Judgment Below Must Be Reversed, Because the Jury's Special Verdicts, Amply Supported by the Evidence, Establish All of the Remaining Elements of Plaintiff's Claim.

As heretofore indicated, Anderson's claim against General Motors is premised on General Motors' failure to disclose to Anderson General Motors' policy of terminating distributorships whenever it became more profitable to General Motors to do so. In order to recover on such a non-disclosure theory, it is necessary to establish:

1. The existence of certain facts known to party "A".
2. A duty on the part of "A" to disclose those facts to "B".
3. A failure by "A" to disclose the facts to "B".
4. Lack of knowledge of those facts on the part of "B" independent of "A's" disclosure.
5. Damage to "B" resulting from "B's" action or inaction resulting from such non-disclosure.

Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684 (1953);

Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689 (1934);

23 *Am. Jur.* 854;

Restatement of Torts, Sec. 551;

37 *C. J. S.* 244-245.

(See also cases cited *infra*, pp. 46-83.)

As stated in 23 *Am. Jur.* 854:

“The principle is basic in the law of fraud as it relates to non-disclosure that a charge of fraud is maintainable where a party who knows material facts, is under a duty, under the circumstances, to speak and disclose his information, but remains silent . . .”

Again in 37 *C. J. S.* 244-245 the author notes:

“An exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to deceive will amount to fraud as being a deliberate suppression of the truth and equivalent to the assertion of a falsehood. The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud. . . .”

The Washington authorities are in accord with the foregoing rules.

Ikeda v. Curtis, *supra*, 43 Wash. 2d 449, 261 P. 2d 684;

Oates v. Taylor, 31 Wash. 898, 199 P. 2d 924, 928 (1948);

Perkins v. Marsh, *supra*, 179 Wash. 362, 37 P. 2d 689;

Cf., *Normile v. Denison*, 109 Wash. 205, 212, 186 Pac. 305 (1919).

Measured by the foregoing standard, it is clear that in order for Anderson to recover in the instant case upon the basis of General Motors' failure to disclose, it was necessary for Anderson to establish:

1. That General Motors had a policy of terminating distributorships whenever it became more profitable to do so.
2. That General Motors had a duty to disclose that policy to Anderson.
3. That General Motors failed to disclose that policy to Anderson.
4. That Anderson was not chargeable with knowledge of that policy, independent of any disclosure by General Motors.
5. That Anderson suffered damage attributable to such non-disclosure.

The jury's answers to the special questions submitted reveal that, aside from the duty to disclose, each of these elements were in fact established by Anderson to the jury's satisfaction. Moreover, a review of the evidence indicates that the jury's determination that those elements were established is amply supported.

1. *General Motors Had a Policy of Terminating Distributorships Whenever It Became More Profitable to Do So.*

In answer to question No. 4, the jury found that as of November 9, 1951, General Motors had a policy of termi-

nating distributorships.³³ The evidence clearly indicates that even prior to that date General Motors had formulated a policy which contemplated the eventual elimination by Buick of all of its distributors after they had helped to build up Buick's position in their area to a point where Buick felt it could carry on without their services. The origin of that policy, as revealed by the testimony and correspondence of Curtice, Hufstader and others, dated back to the pre-World War II period.

Thus, General Motors' president Harlow H. Curtice testified that during the years immediately preceding World War II (1937-1941), he and Hufstader, then General Sales Manager of Buick, discussed the matter of substituting factory zone operations in place of private distributorships on numerous occasions. Commencing in 1937 or 1938, various studies and surveys were made at the instance of Curtice and Hufstader, comparing the cost of private distributorships with the estimated cost of direct factory distribution. Curtice testified that actually such studies were not essential in view of the fact that both Curtice and Hufstader knew all along that as production and sales increased, Buick would replace its private distributors with direct factory zone operations. Hufstader and Belfie testified substantailly to the same effect.

We have already reviewed the manner in which Buick methodically set about to execute this policy of eliminating

³³In answer to questions number 3 and 5, the jury found that General Motors did not have such a policy during the periods 1941 to 1952 or 1937 to 1941. Apparently the jury was of the view that General Motors' policy originated with the termination of the Howard distributorship in the mid-1940s. However, for purposes of the present appeal, it is not necessary to determine the precise date on which the policy was formulated, for the existence of the policy on November 9, 1951 is itself sufficient to sustain Anderson's claim in view of the substantial expenses (notably the \$500,000 mortgage loan) he incurred subsequent to that date, as a result of his ignorance of General Motors' policy.

its "partners in progress" as soon as it became profitable to do so—the elimination of Noyes in 1944; the elimination of Howard in 1947; and the elimination of the Northwest distributors, including Anderson, in 1953. (See pp. 25-26, *supra*.)

In short, it is clear that General Motors had a long-range policy of eliminating distributorships as soon as it became more profitable to do so, and that the elimination of Anderson was merely one step in the execution of that policy.

2. *General Motors Had a Duty to Disclose That Policy to Anderson.*

In answer to question No. 7, the jury found that General Motors did not have a duty to disclose the aforesaid policy to Anderson, this being the sole "missing link" in Anderson's claim in the view of the jury, as reflected in its answers to the special questions submitted to it. It should be noted that this finding of the jury is directly contrary to the testimony of General Motors' own officials concerning the existence of a duty to disclose in the exercise of the obligation of good faith. (See pp. 20-21, *supra*.)

In subsequent portions of this brief, we shall demonstrate that this issue should never have been submitted to the jury at all, but that the Court should have instructed the jury, in accordance with Anderson's request, that General Motors had a duty, as a matter of law, to disclose its Distributorship Termination Policy to Anderson.

3. *General Motors Failed to Disclose That Policy to Anderson.*

In answer to question No. 8, the jury found that Anderson had no knowledge of General Motors' Distributorship Termination Policy, and the evidence is clearly in

accord. Thus, Anderson's own testimony that General Motors' policy was never disclosed to him was corroborated by the testimony of several General Motors officials, each of whom stated that General Motors' Distributorship Termination Policy was never disclosed to Anderson until long after Anderson's distributorship had been terminated.

4. *Anderson Was Not Chargeable With Knowledge of That Policy Independently of Any Disclosure by General Motors.*

In answer to question No. 8, the jury found that Anderson did not know of General Motors' Distributorship Termination Policy and could not have known of that policy in the exercise of ordinary business prudence. This is entirely in accord with the evidence, which contains no suggestion that Anderson had any knowledge of General Motors' Distributorship Termination Policy prior to October, 1953. Indeed, since the existence of the Policy was known only to certain responsible officials in the General Motors organization, who admittedly never revealed the policy to Anderson, it is clear that Anderson could not be charged with knowledge of its existence.

5. *Anderson Suffered Damage Attributable to Such Non-disclosure.*

While it is not necessary for purposes of the present appeal to determine the precise amount of damages Anderson sustained by virtue of General Motors' non-disclosure, it is clear that he did sustain substantial losses as a result of General Motors' failure to disclose its Distributorship Termination Policy. Thus, in November, 1951, Anderson incurred a mortgage loan of \$500,000 in reliance upon his belief, fostered by General Motors, that his distributorship would not be terminated as long as he per-

formed satisfactorily. Moreover, Anderson testified that he would not have invested hundreds of thousands of dollars in acquiring and improving his facilities, had he known that Buick planned to terminate his distributorship before his investments could bear fruit.

It is true that the jury gave a negative answer to question No. 9a, which stated:

“Did Anderson Buick Company take action in ignorance of a matter which General Motors was required to disclose to Anderson Buick Company because of the relationship between Anderson Buick Company and General Motors?” [Tr. Vol. VI, p. 2462.]

However, in light of the jury's other answers, as heretofore summarized, it is clear that the jury's negative answer to this question flowed from the fact that an affirmative response to the question in the form presented to the jury *would have required the jury to have found a duty to disclose*, whereas, in fact the jury failed to find that such a duty existed. Accordingly, this answer in no way serves to negative Anderson's reliance on the non-existence of General Motors' policy. In fact, in the face of the overwhelming and uncontradicted evidence that Anderson did in fact suffer substantial losses as a result of his ignorance of General Motors' Distributorship Termination Policy, a finding of non-reliance by the jury would have been not only unsupportable, but incredible.

In light of the foregoing, it is clear that *if there was a duty to disclose as a matter of law, the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors.*

B. There Was a Duty as a Matter of Law on the Part of General Motors to Disclose Its Distributorship Termination Policy to Anderson.

1. *The Clear Trend of Authority Is to Establish a Duty to Disclose Wherever Such Disclosure Is Required in the Interests of Fair Dealing.*

In determining whether a duty to disclose exists, the courts sometimes speak in terms of various specific situations under which a duty to disclose exists. Thus, it has been said that such a duty exists where there is a relation of trust and confidence between the parties (see pp. 58-60, *infra*) or where one party has special means of knowledge not available to the other (see pp. 77-79, *infra*), or where a party has made certain statements which require that the remaining facts be disclosed (see pp. 79-80, *infra*).

Gradually, however, the courts have added to and expanded these categories so as to require, in practical effect, that disclosure be made whenever it is required in the interests of fair dealing.

23 *Am. Jur.* 854, 856;

Keeton, *Fraud—Concealment and Non-Disclosure*,
15 *Tex. L. Rev.* 1, 12 (1936);

Prosser on Torts, 2d Ed., 532.

Thus, Professor Keeton, in the classic and oft-cited article in this field, observes (15 *Tex. L. Rev.* 31):

“ . . . When Lord Cairns stated in *Peek v. Gurney* that there was no duty to disclose facts, however morally censurable their non-disclosure may be, he was stating the law as shaped by an individualistic philosophy based upon freedom of contract. It was not concerned with morals. In the present stage of the law, the decisions show a drawing away from this idea, . . .

The attitude of the courts toward non-disclosure is undergoing a change and contrary to Lord Cairns' famous remark it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it. This statement is made only with reference to instances where the party to be charged is an actor in the transaction. This duty to speak does not result from an implied representation by silence, but exists because a refusal to speak constitutes unfair conduct.
. . ."

Again, Dean Prosser comments (*Prosser on Torts*, 2d Ed. 535):

"... The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it."

Even where the parties are dealing at arm's length, it is now recognized that there is a duty to disclose certain material facts known only to one of the parties.

See, *e. g.*,

Perkins v. Marsh, 179 Wash. 362, 37 P. 2d 689 (1934) (Duty of lessors to inform lessees of certain defects in the premises);

Kaze v. Compton, 283 S. W. 2d 204 (C. A. Ky., 1955) (Damages for deceit based on non-disclosure that a drain tile ran beneath the house).

The decisions of the Supreme Court of Washington are in accord with this trend.

Thus, in *Ikeda v. Curtis*, *supra*, involving an action for fraud in the sale of a hotel property based on the seller's failure to reveal that the hotel's income was de-

rived largely from prostitution, the court states (261 P. 2d 691):

"We held in *Perkins v. Marsh*, 179 Wash. 362, 37 P. 2d 689, 690, that, under certain circumstances, there is a duty to disclose a material fact even where there was no fiduciary relationship, . . .

. . .

"In the case at bar there was no misrepresentation as to the *amount* of the income. The court correctly found that the *amount* of the income was larger than that represented by appellant. The only representation as to the *source* of the income was that it came from permanent and transient guests. Nothing was said or shown to respondents which would put them on notice concerning the source of the income. They were buying the good will, furniture and equipment of the hotel. They naturally felt that they were buying a legitimate business. Appellant deceived them to their damage, by failing to reveal the source of the income. Under the peculiar circumstances of this case, it was the duty of appellant to reveal the source of her income to respondents."

And see:

Perkins v. Marsh, supra, 179 Wash. 362, 37 P. 2d 689.

2. *Ordinarily the Question Whether a Duty to Disclose Exists in a Given Case Should Be Determined by the Court as a Matter of Law.*

Keeton, *Fraud—Concealment and Non-Disclosure, supra*, 15 Tex. L. Rev. 1.

Professor Keeton, a leading scholar in the field, observes (15 Tex. L. Rev. 39-40):

". . . The standard devised in this paper for the purpose of determining when a duty of disclosure ex-

ists, was worked out on analogy to the standard of due care under the same circumstances in the field of negligence. The application of the negligence standard is, in doubtful cases, intrusted to the jury; so for convenience in leading up to the problem of non-disclosure it was assumed that the same method of application would be employed. However, there are numerous other examples of standards, some of which are applied by the judges themselves, without the assistance of a jury. As examples, one might cite the standard of fair conduct of a fiduciary in equity. The standard of reasonableness in the law as to restraint of trade, the standard of due process of law in passing on the validity of legislation under the Fourteenth Amendment, and the standard of want of probable cause in the tort action of malicious prosecution. So an important practical question of application of this new standard is presented. The application of standards calls for common sense or the average moral judgment rather than deductive logic, and for this reason some might think that in doubtful cases its application should be left to the jury. However, one of the chief advantages of law is that it gives the magistrate the benefit of all the experience of his predecessors. Take the decisions as to what is fair conduct in a fiduciary. When a judge examines the decisions for the purpose of determining what is fair and what is not fair, while he may be unable to get a rule he can still get a very fair notion of what experience has shown that a fiduciary has been permitted to do and what a fiduciary ought not to do. In fact, it is believed that he can get a far better estimate of this than a jury can acquire through instructions by the trial judge as to the factors to be considered. Moreover, the trial judges would be greatly hindered in many jurisdictions in view of a prejudice against permitting judges to comment on

the evidence. On the whole it would seem that this problem of non-disclosure should be one for the court to pass upon in all cases.”

Moreover, the question whether a duty to disclose exists in a given case is in general a consequence which the law imposes by virtue of the particular relationship existing between the parties. For example, a principal has a duty of disclosure to his agent arising out of the relationship between the parties (see pp. 61-63, *infra*). Likewise, one partner has a duty to disclose material matters to another partner by virtue of the fiduciary relationship existing between them (see pp. 70-71, *infra*).

It is clear, therefore, that a duty to disclose is not an obligation voluntarily undertaken by a party, but is instead an obligation which the law fastens upon a party as a result of the particular relationship he bears to the party to whom the duty is owing. Accordingly, there is no occasion to submit to the jury the question whether a duty to disclose exists in a particular case; rather, it is for the Court to determine whether the relationship existing between the parties is such that the law will impose a duty to disclose as an inevitable consequence thereof.

In subsequent portions of this brief, we shall demonstrate that such a relationship existed in the instant case. For present purposes, however, we merely wish to emphasize the trial court's error in failing to determine for itself whether General Motors was under a duty to disclose its Distributorship Termination Policy to Anderson.

3. *The Relationship in the Instant Case Between Anderson and General Motors Was Such That There Was a Duty to Disclose as a Matter of Law.*

In the preceding section we noted that the leading authority in the field declares that the question whether there is a duty to disclose should be determined by the Court as a matter of law. While we are fully in accord with his views, we submit that even if it be assumed that such a question might be submitted to the jury in a proper case, in the instant case the obligation to disclose was so clear, by virtue of the nature of General Motors' relationship to Anderson as established by the uncontradicted facts and the testimony of defendant's own witnesses, that this matter should have been determined by the Court in Anderson's favor.

In order to demonstrate that this is in fact the case, we shall review briefly the various factors which the courts have considered in determining whether a duty to disclose exists. Each of these factors in itself has been held sufficient to impose a duty of disclosure. We submit that their cumulative effect in the instant case establishes a duty to disclose as a matter of law even under a standard much less exacting than the "fair conduct" standard toward which the courts have tended.

(a) General Motors Occupied a Confidential Relationship to Anderson.

It is well-established that a duty to disclose exists between parties occupying a confidential relationship.³⁴

23 *Am. Jur.* 858-860;

Restatement of Torts, Sec. 551.

Thus, *Restatement of Torts*, Section 551, states:

“(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated

“(a) such matters as the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.”

In applying the foregoing rule, the courts have given the term “confidential relationship” a broad interpretation.

Steiber v. Vanderlip, 136 Neb. 862, 287 N. W. 773 (1939);

Wilson v. Rentic, 124 Okla. 37, 254 Pac. 64 (1926);

Voellmeck v. Harding, 166 Wash. 93, 6 P. 2d 373 (1931);

Klika v. Albert Wenzlick Real Estate Co., 150 S. W. 2d 18 (1941);

Selle v. Wrigley, 233 Mo. App. 43, 116 S. W. 2d 217 (1938).

³⁴“The following relations among others have been held confidential so as to impose a duty to reveal all facts material to the transaction involved: Attorney and client, officers of a corporation and stockholders, joint purchasers, joint owners selling the jointly owned property, partner and copartner, persons under contract to marry, physician and patient, priest and parishioner, principal and agent, and trustee and cestui que trust. Disclosure of all material facts is likewise required of a person making contracts of insurance. . . .”

37 C. J. S., pp. 248-249.

In *Selle v. Wrigley*, *supra*, the court states (116 S. W. 2d 221):

“A confidential relationship may be said to exist where two persons stand in such a relation as that, while it continues, confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other. *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369. The principle is thus stated in 27 American and English Encyclopaedia of Law, 460, 461: ‘The origin of the confidence and source of the influence are immaterial. The rule embraces both technical fiduciary relations and those information relations that exist whenever one trusts in and relies upon another. The only question is, does such a relation in fact exist?’

“ . . .

“It may therefore be said that a confidential relation exists between two persons, whether their relations be such as are technically fiduciary or merely informal, whenever one trusts in and relies on the other. The question in such case is always whether or not trust is reposed.”

In *Wilson v. Rentie*, *supra*, the court, in holding that one who had acted as a business adviser, though not an attorney, occupied a confidential relationship toward those whom he advised, stated that such relationship includes

“any relation existing between parties, wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party, and includes legal and all other relationships where confidence is rightfully reposed. . . .” (254 Pac. 66.)

Again, in *Steiber v. Vanderlip, supra*, the court states (136 Neb. 868):

“ . . . The rule as to confidential or fiduciary relations applies to any transaction or situation of advantage, in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence is thereby created on the other. . . .”

In *Voellmeck v. Harding, supra*, the Supreme Court of Washington states (6 P. 2d 376):

“ ‘A good deal has been said as to what constitutes a confidential relation, within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustee and cestui que trust, principal and agent, are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another. No part of the jurisdiction of the court is more useful, it has been said, than that which it exercises in watching and controlling transactions between parties standing in a relation of confidence to each other; and, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact,—where confidence is reposed on the one side, and the resulting superiority and influence on the other. . . .”

Applying the foregoing standard to the instant case, it is clear that a confidential relationship as that term is un-

derstood in the law of fraud existed between General Motors and Anderson during the term of Anderson's distributorship.

First of all, the relationship between a distributor and a manufacturer is generally recognized as imposing upon each party an obligation to deal with the other in good faith, including a duty to disclose facts material to the distributorship.

See:

Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F. 2d 697, *infra*, pp. 67-68.

This follows in part, of course, from the fact that the distributor is an agent of the manufacturer, which, as his principal, occupies a fiduciary relationship toward him.

It Is Well Established, of Course, That a Principal and Agent Have a Duty to Each Other to Make a Full Disclosure as to All Matters Material to the Agency.

Twohig, 224 F. 2d 493, 497 (C. A. 8, 1955).)

See, *e. g.*,

Kruse v. Miller, 143 Cal. App. 2d 656, 300 P. 2d 855 (1956);

Restatement of Agency, Second, Sec. 435.

Thus, in *Kruse v. Miller*, *supra*, the court held that an agent violated his duty to his principals by not informing them of certain representations he had made in connection with a sale of certain property in their behalf.

It has been recognized that the fiduciary relation between principal and agent is not a "one-way street," *i. e.*, that the principal owes fiduciary obligations to his agent,

including a duty to make full disclosure of facts material to the agency.

Walter v. Libby, 72 Cal. App. 2d 138, 164 P. 2d 21 (1945);

McLeod v. Gaither, 94 Fla. 55, 113 So. 687 (1927);

Louis Schlesinger Co. v. Wilson, 22 N. J. 576, 127 A. 2d 13 (1956);

Restatement of Agency, Second, Sec. 435.

Thus, *Restatement of Agency*, Section 435, states:

“Unless otherwise agreed, it is inferred that a principal contracts to use care to inform the agent of risks of physical harm or pecuniary loss which, as the principal has reason to know, exist in the performance of authorized acts and which he has reason to know are unknown to the agent. . . .”

Again, in *McLeod v. Gaither*, *supra*, the court states (113 S. W. 687, 688):

“In *Porte F. Quinn et al. v. John S. Phipps*, 113 So. 419, decided last term (April 11, 1927), this court at some length announced the law in this state governing the conduct and fidelity of a real estate broker to his principal. In this case we have the reverse situation so the main question presented concerns the degree of good faith due on the part of a principal to both his co-principal and his broker. . . .

“ . . .

“ . . . The doctrine of *Quinn et al. v. Phipps* is equally as binding on the principal when dealing with his coprincipal or broker as it is on the broker when dealing with his principal. Both are required to deal squarely and in good faith. . . .”

In *Louis Schlesinger Co. v. Wilson*, *supra*, the court held that where plaintiff undertook to procure a purchaser for certain land belonging to defendant in return for a specified commission, defendant was under a duty as a matter of law to disclose to plaintiff the fact that he had previously granted an option of purchase on the same land to a third party, explaining (22 N. J. 585, 586):

“ . . . The charge is not made to enforce the contents of the oral agreement but to compensate the plaintiff for its loss engendered by the deceit. *Nanos v. Harrison*, 97 Conn. 529, 117 A. 803 (Sup. Ct. Err. 1922). The confidence arising from a principal-agent relationship is not charted on a one-way street. Good faith works in both directions. . . .”

“ . . . Clearly it was defendant's duty to inform plaintiff of the option agreement which was executed prior to the oral understanding. Cf. Restatement, Agency, sec. 435 (1933), and note especially comment (c); *Romine v. Green*, 13 N. J. Super. 261 (App. Div. 1951). That duty was not fulfilled. . . .”

It is well recognized that the relationship of a manufacturer to a distributor includes that of principal and agent.

See, *e. g.*,

Champion Spark Plug Co. v. Automobile Sundries Co., 273 Fed. 74 (C. C. A. 2, 1921);

Pugh v. A. D. Bothne Co., 178 Ia. 601, 159 N. W. 1030 (1916);

John v. Baltimore & O. R. Co., 118 Fed. Supp. 317, 328 (N. D. Ill., 1954) (Remanded on other grounds in *Lawrence Warehouse Company v. Twohig*, 224 F. 2d 493, 497 (C. A. 8, 1955)).

Thus, in *Champion Spark Plug Co. v. Automobile Sundries Co.*, *supra*, the court held that a distributorship contract created the relationship of principal and agent, in addition to that of buyer and seller, and that "it was therefore important to have the jury understand the requirement of complete fidelity, which was owing by the agent to its principal, and which the defendant had the right to expect, . . ." (273 Fed. 77).

Again, in *Pugh v. A. D. Bothne Co.*, *supra*, the court, in holding that an automobile dealer was an agent of the automobile manufacturer, states (159 N. W. 1031):

"It will be noted from this contract that it contemplates the purchase of cars from time to time by the dealer from the manufacturer. . . . There is no necessary antagonism between the relation of purchaser and seller and that of principal and agent. An agent may buy from his principal, and yet maintain in other respects the relation of an agent. In this case, although the dealer agreed to purchase, he did so for the purpose of a resale. He was not a purchasing customer in the ordinary sense. The ultimate customer for the vehicle was to be found by the dealer. The dealer was not even purchasing at wholesale in the ordinary sense. He was not in the market buying automobiles in quantities where he could buy the best. The foregoing contract contains 21 specifications. Comparatively few of them deal with the relation of purchaser and seller. If no other relation than that of purchaser and seller was contemplated, then many of the provisions of the contract are not only unnecessary, but are impertinent. The dealer binds himself therein to certain conduct in the handling of the product of the manufacturer even after its purchase. He undertook to furnish a place for the exhibition of the product of the manufacturer. He receives its lit-

erature and distributes its advertising. He delivers its printed warranties to his retail customers. He is entitled to the benefit of the advertising of the manufacturer, and the manufacturer is entitled to the benefit of his diligence in pushing sales to the end that the business of the manufacturer as well as that of the dealer may be increased. All these matters are fairly within the contemplation of the contract. . . .”

The essential attributes of the principal-agent relationship, as set forth in *Pugh v. A. D. Bothne Co.*, *supra*, are likewise found in the instant case. Here, too, the distributorship contract is devoted essentially to various facets of the principal-agency relationship between the parties. Thus, Anderson, like the dealer in the *Pugh* case, binds himself to the handling of the product of the manufacturer after its purchase [Tr. Vol. I, pp. 74-77]. Here, too, Anderson undertook to furnish a place for exhibition of the product of the manufacturer [Tr. Vol. I, p. 70] and the manufacturer is entitled to the benefit of Anderson's diligence to the end that the business of the manufacturer, as well as that of the distributor, may be increased [Tr. Vol. I, pp. 72-73].

In short, the elements which existed in the *Pugh* case are likewise present in the instant case, and it seems equally clear that the relationship between General Motors and Anderson included that of principal and agent. This principal-agency aspect of the distributorship relation would, of course, create a duty of disclosure on the part of the manufacturer-principal to his distributor-agent under the authorities heretofore cited.

But regardless how the distributorship relationship is classified, however, *the courts have recognized that such*

a relationship imposes upon each party an obligation to deal with the other in good faith.

Smyth Sales, Inc. v. Petroleum Heat & Power Co.,
128 F. 2d 697 (C. C. A. 3, 1942);

E. H. Taylor, Jr. & Sons v. Julius Levin Co.,
274 Fed. 275 (C. C. A. 6, 1921).

Illustrative of the decisions in this area is *E. H. Taylor, Jr., & Sons v. Julius Levin Co.*, *supra*, where the court comments as follows with respect to a liquor distributorship (274 Fed. 278, 279, 282):

“From the beginning of the controversy, Taylor contended that the contract with Levin was substantially one of agency, while Levin has insisted that the relations between them were those of vendor and vendee. It seems to have been thought that one or the other label must be applied, and that, when the contract had been thus classified, the legal rules applicable to the rejected theory would be eliminated from any application. We do not thus view the situation. We are content, so far as concerns the title to the whisky for which notes had been given, to accept and approve the findings below to the effect that this whisky had been set aside, appropriated, and paid for by the giving of the notes, and had become the absolute property of Levin, subject to the pledge evidenced by the warehouse receipts to secure the unpaid purchase price. In this respect, there was no agency; but this covers only part of the contract relations. The sharing of the Levin advertising expenses, the arrangement by which Taylor not only would sell to no one else in the Levin Territory, but would, as far as possible, compel all Eastern purchasers or jobbers of Old Taylor to keep out of it, the plan by which they used their joint credit to finance the deals over a continuing four-year period—all these elements of the

arrangement constantly continued to be executory, and, though they did not necessarily evidence an agency in the strict sense of that term, they did show that the parties were engaged in a continuing, executory, joint adventure, to which each was to contribute his share for the common good. . . .”

“ . . .

“It is not material whether the name ‘agency’ be adopted or repudiated, and when we hereafter speak of this exclusive agency, we intend the actual relationship, without regard to strict nomenclature; . . .

“ . . .

“ . . . In the present contract, as to its executory portions, the continuing dependence of each upon the integrity and faithfulness of the other necessarily subjects it to the same rules in the respect now under consideration as are applied to strict contracts of agency.”

Smyth Sales, Inc. v. Petroleum Heat & Power Co., *supra*, involved an action for fraud and deceit by a distributor of fuel oil for failure to disclose the commissions due on certain sales. In holding such non-disclosure actionable, the court stated (128 F. 2d 700-701):

“ . . . we are prepared to predicate liability on the theory that the defendant was under a duty, arising out of the relation of the parties as a result of their contract, to disclose the commissions due the plaintiff on the ‘Electrol’ sales.

“Exclusive sales agreements have been variously construed as creating an agency or a buyer and seller relationship. In most of the cases found there was not the relation of principal and agent in the ordinary sense of that term but the grant by a distributor (who was a manufacturer or wholesaler) to a distributee (a wholesaler or retailer) of an exclusive right to

sell products of the former. This is the situation in the case at bar. However, the resultant relationship is not totally devoid of attributes which the law imposes upon parties in the relation of principal and agent. In other words the duties of mutual trust, confidence and loyalty so far as the subject matter of their dealing are concerned are applied to the parties to an exclusive sales transaction. The parties are not, as ordinary vendor and vendee, dealing at arm's length. They have, of their own accord, agreed to conform to a peculiar but mutually advantageous arrangement. We believe that this relationship requires full disclosure by the parties of all facts pertinent to the exclusive sales provision, and that the decisions cited above support this view of the relation."

In light of the foregoing authorities, it is clear that General Motors occupied a confidential relationship to Anderson under which it was required to disclose to Anderson all matters material to the distributorship.

However, it is not necessary to rely solely upon the rules governing the relationship between a manufacturer and distributor in general, because

it is clear that the particular relationship with which we are here concerned was such as to impose upon General Motors, as a matter of law, a duty to make full disclosure to Anderson of General Motors' Distributorship Termination Policy.

1. *Partners in Progress.*

The testimony of responsible General Motors' officials—several of whom acknowledged their close personal friendship with Anderson—establishes beyond question the closeness of the relationship which existed between General Motors and Anderson during the period of Anderson's distributorship.

Thus, Harlow Curtice, General Motors' president and former Buick General Manager, described the relationship as one of "partners in progress," and again as a partnership "in a business sense." According to Curtice, the relationship between General Motors on the one hand and its dealers and distributors on the other, is a "continuing personal relationship," a "close relationship," a "mutually helpful relationship," and one which is "interdependent." In fact, Curtice testified that "there is no business in which the relationship is so interdependent."

William Hufstader, General Motors' vice president and former general sales manager of Buick, likewise testified that an unusual mutuality exists between the automobile manufacturer and his dealers and distributors.

During his "partnership" with Buick, Anderson devoted his time, efforts and financial resources for some 17 years in carrying out Buick's program in the Pacific Northwest and building up good will for Buick's product. His success in taking over an anemic distributorship and building it up to a position where it ranked third in the nation was recognized by General Motors' own officials.

But the obligations flowing from General Motors' "partnership in progress" with Anderson were not a "one-way street," for General Motors on its part owed Anderson an obligation to treat him fairly and to deal with him in good faith. Indeed, General Motors' president Harlow Curtice conceded that General Motors was under an obligation to act in good faith toward Anderson, while William Hufstader, General Motors' Vice President and former Buick Sales Manager, testified that good faith is the essence of a successful franchise relationship. Moreover, Hufstader expressly declared that by virtue of General Motors' obligation

to deal fairly with its distributors, *General Motors was bound to notify a distributor such as Anderson of all matters which might affect the latter's welfare in connection with the performance of his distributorship.*³⁵

In light of the "partners in progress" relationship which existed between General Motors and Anderson, it is clear that General Motors owed Anderson certain duties which flow as a matter of law from such a relationship. Among those duties is the duty to make full disclosure as to all material matters respecting the subject matter of the joint enterprise peculiarly within the knowledge of one of the parties. The existence of such a duty presents no fact question for a jury. Rather, it is an obligation which the law imposes by the very nature of a "partners in progress" relationship, which in its fiduciary aspects is closely akin to a partnership in law.

Cf., Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F. 2d 700, discussed pp. 67-68, *supra*.

As with a partnership relation in the conventional sense, "the status of the parties being thus fixed, the law applying is, of course, well settled."

Galbraith v. Devlin, 85 Wash. 482, 148 Pac. 589 (1915);

Cf., Kittilsby v. Vevelstad, 103 Wash. 126, 173 Pac. 744 (1918);

Karle v. Scder, 35 Wash. 542, 214 P. 2d 684 (1950).

³⁵Hufstader testified that

"any relationship entered into in good faith has to have a mutuality of understanding, objective, and if it be to the interests of either party that plans be discussed that require the thoughtful application of both, then as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutuality of interest" [Hufstader Dep. p. 414].

Thus, in *Karle v. Seder, supra*, the court held that the mere fact that the personal relation between the partners may be strained in a given case, does not alter the fiduciary relationship existing between them, or the obligations arising therefrom.

Accordingly, it was error for the trial court to permit the jury to determine whether General Motors owed such an obligation of disclosure to its partner in progress, Anderson. Rather, the Court should have instructed the jury, as requested by plaintiff, that *such a duty was owing by General Motors to Anderson as a matter of law*.

2. *Control of Anderson by General Motors.*

Not only was the relationship between Anderson and General Motors an extremely close one, but it was also a relationship in which the parties were not on an equal footing. On the contrary, General Motors completely dominated and controlled Anderson.

Before commenting on the facts of the instant case, it should be noted that the position of dominance and control which General Motors occupies toward its dealers has been recognized both by the courts and by Congress.

See, *e. g.*,

United States v. General Motors Corp., 121 F. 2d 376 (C. C. A. 7, 1941);

House Report No. 2850, 84th Congress, 2nd Sess. (1956), U. S. Code. Cong. and Admin. News, pp. 4596-4609;

United States Congress Senate, Antitrust Laws Study (1956).

Thus, in *United States v. General Motors Corp., supra*, involving a prosecution for conspiracy to restrain trade

by compelling General Motors dealers to finance their automobiles through GMAC upon threat of cancelling their dealership contracts, the court comments as follows with respect to General Motors' relationship *vis-a-vis* its dealers (121 F. 2d 386-387):

“ . . . General Motors automobiles are sold through some 15,000 dealer outlets located in every state in the country. . . . All dealers operate under written franchise agreements entered into with GMSC, and they are required to have a substantial investment in buildings, parts, accessories and signs, and to provide ample space and personnel for the sale and servicing of cars. . . .

“The franchise contracts recite that they shall continue in force ‘until cancelled or terminated,’ but in practice it is customary to ‘renew’ them each time a new model is introduced. . . . The dealers are required to keep a uniform accounting system, to permit audits of accounts and records by GMSC, and to furnish GMSC with certain estimates and reports, namely, an annual estimate, a monthly estimate, and a 10-day report. The annual estimate states in advance of retail orders what the dealer’s anticipated car needs by months for the coming calendar year will be. The monthly estimate states in advance of retail orders what the anticipated requirements for the following three months will be. The 10-day report shows retail sales of both new and used cars made during the period, new and used car stock, and unfilled retail orders on hand at the end of the period. . . .

“It also appears that dealers are required to submit 30-day reports and monthly financial statements. The 30-day reports show the number of used cars junked or sold at retail, the number of new cars sold

at retail for cash, and the number of new and used cars sold on time. The monthly financial statements cover operations for the preceding month and show the actual condition of the business. The 10-day reports, the 30-day reports and the financial statements are mailed to or otherwise received by the zone manager of the proper motorcar unit of GMSC. The data contained in these reports and statements are compiled and forwarded to the regional manager, who in turn makes a similar composite compilation pertaining to his territory and sends it to the General Sales Manager. All this data and information is consolidated, and in due time the final product represents a national picture on dealers' operations, a document of value to the central office of GMSC."

Recent findings of Congressional Committees as to the nature of General Motors' relationship to its dealers are to the same effect. For the convenience of the Court we have set forth pertinent extracts from those findings as Appendix A to this brief.

The foregoing observations are amply demonstrated by the facts of the instant case. We have already reviewed at length the manner in which General Motors dominated and controlled Anderson. (See pp. 4-18, 21-22, *supra*.) Thus, General Motors required Anderson to consult with his General Motors superiors before taking any action of consequence in connection with his distributorship.

Likewise, Anderson's superiors in General Motors made periodic inspections of his facilities in the course of which they reviewed every phase of Anderson's operation. Another control device employed by General Motors was its practice of requiring that Anderson furnish his superiors in the Buick organization with frequent reports on all

phases of his operations, such as inventories, physical facilities and financial condition.

Such personal contacts and individual reports were supplemented by meetings at which Anderson and other Buick distributors were told by General Motors' officials how their operations were to be conducted. Still another means of securing conformity included a zone manual prepared by General Motors with which Anderson was required to comply, as well as General Motors' requirement that Anderson employ a standardized accounting system devised by General Motors.

The information thus gleaned by General Motors was tabulated and analyzed in order to determine whether Anderson was carrying out the policies laid down by General Motors. Any deviation from the norm would, of course, be called to Anderson's attention and such pressure as might be required would be exerted upon Anderson to secure compliance with General Motors' wishes.

It was in this manner that General Motors compelled Anderson to increase his working capital, in accordance with General Motors' master plan, although Anderson himself did not consider such an increase necessary. Such methods were likewise employed to induce Anderson to make substantial investments in physical facilities until they reached the point where General Motors itself regarded the Anderson enterprise as "magnificently housed."

At times General Motors' control over Anderson assumed the guise of "friendly persuasion," but sterner tactics were employed when necessary, as when Buick's General Sales Manager Hufstader summoned Anderson to Flint and bluntly ordered him not to seek the presidency of the 30,000-member National Automobile Dealers Association.

From time to time, General Motors' control over Anderson became even more open and direct. Thus, from 1936 to 1940 and from 1942 to 1945, General Motors took direct control over Anderson through its Motors Holding Company subsidiary and, through minutes prepared in the offices of Motors Holding, formulated many of Anderson's permanent business policies for him.

The effectiveness of General Motors' tight control over Anderson is evidenced by the fact that the written dealership agreements under which Anderson operated were not negotiated by the parties, but were prepared unilaterally by General Motors, which would periodically herd Anderson and its other distributors together and pass out a printed form of agreement which General Motors had prepared for their signatures.

Such passive submission on the part of Anderson is hardly surprising in view of the relative economic positions of General Motors—the nation's largest corporation—and Anderson, one of Buick's three thousand or more dealers and distributors. The termination by Anderson of his relationship with Buick would hardly have created a ripple in General Motors' vast empire, whereas General Motors' severance of its relations with Anderson would, and in fact did, result in financial ruin to Anderson. In short, the relationship of General Motors to Anderson was one of complete domination and control.

The existence of such a position of dominance has been relied upon time and again as establishing a relationship of trust and confidence.

See, *e. g.*,

Selle v. Wrigley, *supra*, 233 Mo. App. 43, 116 S. W. 2d 217.

Thus, in *Selle v. Wrigley, supra*, the court, in holding that defendant occupied a confidential relationship to plaintiff, pointed out (116 S. W. 2d 221):

“ . . . that the defendant at once assumed authority over him and set himself up as the plaintiff’s friend, adviser, and protector, assuming the place of a parent to him. He put him to work and directed his movements from day to day. By his attitude, his conduct, and his authority exercised, he readily obtained an influence over the plaintiff and naturally led him to repose confidence and trust in him.”

The same observations might well be made with respect to General Motors’ relationship to Anderson.

In light of the extensive control which General Motors exercised over Anderson’s operations, and of Anderson’s dependence upon General Motors, it is not surprising to find that Anderson was required to obtain approval from responsible General Motors officials before undertaking any business venture. For example, whenever Anderson was considering the acquisition of new facilities, the disposition of existing facilities, or any other business decision, he was required to clear the project with General Motors (see pp. 4-6, *supra*).

As a corollary of General Motors’ domination and control over Anderson, and the resulting trust and confidence which Anderson reposed in his General Motors superiors, *General Motors had a duty as a matter of law to disclose to Anderson all matters of importance affecting his distributorship*. (In fact, Anderson’s superiors in the General Motors organization appeared to recognize their obligation in this regard, although they did not fulfill it with respect to the matter at issue (see pp. 20-21, *supra*).)

Nevertheless, when Anderson's superiors in General Motors had formulated a policy under which they planned to eliminate Anderson's distributorship as soon as it became more profitable to do so, they failed to disclose this fact to Anderson, but instead encouraged him to invest substantial sums in his distributorship, from which they knew he would never have an opportunity to reap the harvest to which he was entitled.

3. *Superior Knowledge of General Motors.*

Even in the absence of a confidential relationship, the courts have held that there is a duty to disclose facts within the exclusive knowledge of one of the parties, particularly where the other party has no other means of obtaining knowledge of those facts.

Villalon v. Bowen, 70 Nev. 456, 273 P. 2d 409 (1954);

Kuhn v. Gottfried, 103 Cal. App. 2d 80, 229 P. 2d 137 (1951);

Everett v. Gilliland, 47 N. M. 269, 141 P. 2d 326 (1943);

And see,

Oates v. Taylor, supra, 31 Wash. 898, 199 P. 2d 924, 928 (1948);

23 *Am. Jur.* 856, 857;

37 *C. J. S.* 246.

Thus, in *Villalon v. Bowen, supra*, the court states (273 P. 2d 414, 415):

"Yet, even in absence of a fiduciary or confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the

knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party. Under such circumstances the general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. This would appear to be particularly so where the false impression deliberately has been created by the party sought to be charged. . . .”

Again in *Kuhn v. Gottfried*, *supra*, the court observes (229 P. 2d 141):

“ . . . Concealment may constitute actionable fraud where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer. . . .”

In *Everett v. Gilliland*, *supra*, the court, in holding that defendant sellers were duty-bound to disclose to plaintiff purchaser all information within their knowledge as to the balance due on a certain mortgage which plaintiff assumed under his agreement, stated (141 P. 2d 330):

“ ‘ . . . There is much authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain.’ ”

In the instant case, it is clear that the existence of General Motors’ policy of distributorship termination was a matter solely within the knowledge of certain General Motors officials, and there was a clear duty on the part

of General Motors as a matter of law to disclose that policy to Anderson. Nevertheless, General Motors' Distributorship Termination Policy was never disclosed to Anderson. Indeed, as pointed out below, Anderson was constantly assured by General Motors' officials of the long-range nature of his distributorship. Even the steps by which General Motors executed its Distributorship Termination Policy—*i.e.*, the elimination of various distributorships throughout the country—were not disclosed to Anderson.³⁶

4. *Representations and Promises by General Motors.*

Still a further basis for General Motors' duty to disclose its Distributorship Termination Policy to Anderson lies in the various promises and representations that General Motors made to Anderson.

First of all, as heretofore noted, Jerome Nash, Anderson's immediate superior in the Buick organization, had assured Anderson that he would keep him informed of all matters affecting Andersons' distributorship.

Secondly, various General Motors officials, including Hufstader and Curtice who originally formulated General Motors' policy of terminating distributorships whenever it became more profitable to do so, constantly spoke in terms of the long-range nature of General Motors' dealer and distributorship franchises in general, and Anderson's distributorship in particular.³⁷

³⁶Indeed, the jury itself expressly found that Anderson did not and could not reasonably have known of General Motors' Distributorship Termination Policy.

³⁷As a further evidence of the long-term nature of Anderson's distributorship, General Motors provided special training courses for Anderson's sons, along with the sons of other dealers and distributors, covering all phases of dealership management.

Furthermore, whenever Anderson evidenced any concern to his superiors regarding a possible termination of his distributorship, his mind was quickly put at rest. Thus, in 1947, when Anderson heard rumors as to the termination of the Howard distributorship and became perturbed about the duration of his own distributorship, he was assured by Jerome Nash, Buick's Pacific Coast regional manager, that the Howard termination was not a matter which need concern Anderson, Nash testifying that he put Anderson's mind "at rest."

It is submitted that under such circumstances General Motors was obligated as a matter of law to disclose its Distributorship Termination Policy to Anderson. The courts have repeatedly recognized that such conduct is in itself sufficient to render the non-disclosure actionable as a matter of law.

Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684, 691 (1953);

Kuhn v. Gottfried, *supra*, 103 Cal. App. 2d 80, 229 P. 2d 137;

Everett v. Gilliland, *supra*, 47 N. M. 269, 141 P. 2d 326.

Thus, in *Kuhn v. Gottfried*, *supra*, the court notes (229 P. 2d 141):

" . . . where one is under no duty to speak, but yet undertakes to do so, either voluntarily or in response to inquiry, he must make a full and fair disclosure and conceal no facts within his knowledge which materially qualify those stated, . . ."

Again, in *Everett v. Gilliland*, *supra*, the court observes (141 P. 2d 331):

" . . . The defendant, Charles E. Gilliland, having undertaken to disclose all the facts concerning the mortgage indebtedness, was bound to do so. . . ."

5. *Other Factors.*

In addition to the foregoing factors, Professor Keeton has suggested others which should be taken into account in determining whether a duty to disclose exists. Among these are the nature and materiality of the fact not disclosed, and the type of damage which the person lacking the information is likely to suffer as a result of non-disclosure.

Keeton, *Fraud—Concealment and Non-Disclosure*,
supra;

15 Tex. L. Rev. 1,

In the instant case, it is clear that General Motors' policy of distributorship termination was of the utmost materiality to Anderson, for the execution of that policy resulted in Anderson's extinction as a distributor. The damage which Anderson was likely to, and did in fact, suffer as a result of General Motors' failure to disclose that policy is likewise apparent.

Thus, Anderson invested substantial sums in distributorship facilities of a permanent nature and incurred a long-term (15 year) indebtedness of half a million dollars to procure working capital, all in reliance on the assumed long-term nature of his distributorship. It is clear that Anderson would not have made those investments or incurred such indebtedness had he been aware of General Motors' Distributorship Termination Policy. In short, as must have been anticipated, the non-disclosure of General Motors' Distributorship Termination Policy to Anderson led to Anderson's economic ruin.

SPECIFICATION OF ERROR NO. II.

II.

**The Court Erred in Refusing to Submit to the Jury
Anderson's Claim Based on Nash's 1947 Representations to Anderson.**

One of the bases upon which Anderson sought recovery in the trial court was that certain representations were made to Anderson in 1947 by Jerome Nash, Anderson's immediate superior in the Buick organization, to the effect that Anderson's distributorship would not be terminated as long as Anderson rendered satisfactory performance. There was substantial evidence that such representations were made; in fact, Anderson's testimony in this regard was largely corroborated by Nash.

The substance of this testimony is that in 1947 Anderson heard a rumor that the Howard distributorship in California had been terminated, whereupon Anderson phoned Nash in San Francisco, told him he was disturbed by the rumor, and inquired as to its truth. Nash confirmed the truth of the rumor and told Anderson not to be disturbed. Nash emphasized the importance of keeping the matter confidential so as not to disconcert the other Northwest distributors.

Anderson testified that he expressed concern to Nash regarding a projected expansion of Anderson's facilities and that Nash replied that the Howard distributorship was terminated because Howard had not done an adequate job in obtaining market penetration for Buick, but that this did not apply to the Northwest distributors, including Anderson, which were individually owned and well-managed. Anderson testified that Nash assured him that Anderson should go ahead with his program, as there

was nothing to worry about as long as Anderson continued to do a proper job and that he (Anderson) had implicit faith in what Nash told him.

Nash testified that he told Anderson, who appeared perturbed at the Howard termination, "This does not concern you", and that he put Anderson's mind at rest.

Nash subsequently confirmed the telephone conversation by a letter which referred to a forthcoming trip to the West Coast by Hufstader and Curtice, at which time they would meet with the Northwest distributors and discuss their distribution plans for the Pacific Coast region.

In light of the foregoing, it is clear that the evidence was more than sufficient to establish the making of the representations in question. It is equally clear that, assuming such representations were made, they warranted recovery by Anderson on a fraud theory in light of General Motors' subsequent arbitrary termination of Anderson's distributorship in the face of Nash's assurances that the distributorship would be continued as long as Anderson performed properly.

Nevertheless, the trial court ruled as a matter of law that Anderson could not recover on account of the representations, and submitted the case to the jury solely on the basis of the representations made to Anderson in 1951. It is submitted that the Court thereby committed error for which the judgment below should be reversed.

III.

The Written Dealership Contracts Do Not Preclude Recovery by Anderson on a Fraud Theory.

While the written dealership contracts which General Motors prepared and submitted in printed form to Anderson purported to negate any oral representations [Tr. Vol. I, pp. 97-98], it is well-established that parol evidence is nevertheless admissible to establish a basis for recovery on a fraud theory—this on the ground that one cannot obtain contractual immunity for his fraud.

Gronlund v. Andersson, 38 Wash. 2d 60, 227 P. 2d 741 (1951);

Champlin v. Transport Co., 177 Wash. 659, 33 P. 2d 82 (1934);

Producers' Grocery Co. v. Blackwell Motor Co., 123 Wash. 144, 212 Pac. 154 (1923);

Flint v. Owl Land & Investment Co., 122 Wash. 401, 210 Pac. 811 (1922);

Wells v. Walker, 109 Wash. 332, 186 Pac. 857 (1920);

Normile v. Denison, 109 Wash. 205, 186 Pac. 305 (1919);

Bryant v. Troutman, 287 S. W. 2d 918 (C. A. Ky., (1956).

Thus, in *Bryant v. Troutman*, *supra*, the court held that non-disclosure of facts known to the seller constituted grounds for an action of deceit, despite the following language in the contract of sale (287 S. W. 2d 920):

“We have read the entire contents of this contract and are not relying on verbal statements not contained herein. We further certify that we have examined the property described hereinabove; that we are thoroughly acquainted with its condition and accept it as such.”

The Washington authorities are clearly in accord with the general rule. As stated in *Flint v. Owl Land & Investment Co.*, *supra* (210 Pac. 813):

“ . . . The rule or doctrine of merger ‘is in effect a statement, in different form, of the rule excluding evidence of prior or contemporaneous oral agreements to contradict or modify the written contract, based on the presumption that, *in the absence of accident, fraud or mistake*, the whole agreement of the parties is expressed in the writing.’ 13 C.J. p. 797, § 616. But this suit is not upon either the formal real estate contract or the deed nor for a breach of either of them. It is an action for fraud and deceit that led to the purchase represented by the resulting written contract and deed. . . .”

Again, in *Wells v. Walker*, *supra*, the court states (186 Pac. 858):

“Errors assigned upon the admission of testimony regarding the alleged false representations, thereby, as it is argued, permitting parol evidence tending to vary the terms of a written contract, which recites that no representations were made other than those contained therein, cannot be sustained here, because, as we have seen, this is an action for rescission of the contract on the ground of fraud. . . .”

In *Producers' Grocery Co. v. Blackwell Motor Co.*, *supra*, the court, in holding that the mere recital in the contract that one of the parties would “not be bound by any understandings, agreements or representations, express or implied, that are not specified herein” does not preclude a showing of fraud, observes (212 Pac. 155):

“ . . . Fraud vitiates everything it touches, and is not merged in the written contract. . . .”

Again, in *Gronlund v. Andersson*, *supra*, the court states (227 P. 2d 743):

“ . . . where the issue is whether a contract was procured by fraud, the doctrine that parol or other extrinsic evidence is inadmissible to contradict, vary, or explain the terms of a written contract is inapplicable. See Annotation, 56 A.L.R. 13. Parol evidence of false and fraudulent representations including one to enter into a written contract is admissible notwithstanding the contract contains an express recital that there have been no representations, or that all oral representations shall be inoperative. . . . ”

Normile v. Denison, *supra*, involved an action by a former wife to recover one-half of certain community property which, it was alleged, was fraudulently concealed by the husband at the time a property settlement agreement was entered into between them. In holding that certain language in the agreement purporting to protect the husband from such claims did not in fact bar such an action, the court stated (186 Pac. 308):

“We cannot hold that one may deliberately conceive a plan to defraud, and then in carrying it into execution, by the use of words such as are contained in the fifth paragraph of the second agreement as above quoted, absolve himself from the consequences. . . . ”

In light of the foregoing authorities, it is clear that General Motors' liability to Anderson by virtue of its fraudulent non-disclosure is in no way precluded by General Motors' insertion of language in the distributorship contracts purporting to negate any oral representations.

Furthermore, it is clear that the terms of the dealership contracts are not in fact inconsistent with the theory upon which Anderson seeks recovery, namely, that General Motors was duty-bound as a matter of law to disclose to Anderson its secretly formulated policy of terminating Anderson's distributorship as soon as it became more profitable for General Motors to do so.

SPECIFICATION OF ERROR NO. III.

IV.

The Court Erred in Granting Defendant's Motion for a Directed Verdict and Motion to Dismiss Plaintiff's Action Following the Verdict of the Jury.

In view of the fact that the judgment appealed from is based solely upon the verdict rendered by the jury, it is perhaps unnecessary to consider the present Specification of Error since the judgment is not based on the granting of the Motion for a Directed Verdict or the Motion to Dismiss. Nevertheless, as a matter of precaution, the error here involved has been assigned. It is briefly discussed because, in substance, the argument heretofore made in connection with Specification of Error No. I is applicable to this Specification of Error. Thus, as we have heretofore pointed out, in order to recover on a non-disclosure theory it was necessary for Anderson to establish:

1. That General Motors had a policy of terminating distributorships whenever it became more profitable to do so.
2. That General Motors had a duty to disclose that policy to Anderson.
3. That General Motors failed to disclose that policy to Anderson.

4. That Anderson was not chargeable with knowledge of that policy independent of any disclosure by General Motors.

5. That Anderson suffered damage attributable to such non-disclosure (see pp. 45-47, *supra*).

The jury's answers to the special questions submitted to it reveal that aside from the duty to disclose, each of these elements was in fact established by Anderson to the jury's satisfaction. Moreover, the evidence indicates that the jury's determination that those elements were established is amply supported (see pp. 47-51, *supra*).

In granting defendant's motions for directed verdict and to dismiss, the trial court relied primarily upon certain language in the printed form of Distributorship Agreement prepared by General Motors, purporting to exclude representations not embodied in the Agreement. However, as we have heretofore pointed out, it is well-established that such provisions do not preclude a showing of fraudulent non-disclosure, as in the instant case, on the theory that no one may obtain contractual immunity for his own fraud (see pp. 84-87, *supra*). As stated in *Herzog v. Capital Co.*, 27 Cal. 2d 349, 354, 164 P. 2d 8 (1945):

"A principal under a positive duty to make a disclosure cannot escape liability for failure to do so by relying on a contract provision to the effect that there are no other representations except those contained in the written agreement."

SPECIFICATION OF ERROR NO. IV.

V.

The Court Erred in Instructing the Jury That Anderson Was Precluded From Claiming That He Signed the Distributorship Agreement of November 1, 1952, Because of General Motors' Non-Disclosure of Its Distributorship Termination Policy.

The uncontradicted evidence establishes that Anderson had no knowledge of General Motors Distributorship Termination Policy prior to October, 1953, when he was shown a letter from William Hufstader to an inquiring stockholder in which Mr. Hufstader stated (in substance), that the termination of Anderson's distributorship was merely one step in effecting Buick's long-established policy of eliminating distributorships, including that of Anderson, whenever it became more profitable to do so [Tr. Vol. III, pp. 1070-1073; Pltf. Ex. 82]. Obviously, therefore, Anderson was not aware of this policy at the time he signed the Distributorship Agreement of November 1, 1952.

Nevertheless, the trial court instructed the jury that Anderson was precluded as a matter of law from contending that he signed the agreement of November 1, 1952, because of his ignorance of General Motors' Distributorship Termination Policy. In point of fact, however, it is obvious that Anderson might well have hesitated to enter into any agreement whatever with General Motors had he known of the fraud which General Motors had thus practiced upon him.

Furthermore, as we have heretofore pointed out, the mere execution of the written distributorship agreement of November 1, 1952, does not preclude a showing of fraud (see pp. 84-87, *supra*).

SPECIFICATION OF ERROR NO. V.

VI.

The Court Erred in Awarding General Motors as an Item of Costs Court Reporters' Fees for Preparing a Transcript of the Proceedings at the Trial.

Among the items in General Motors' cost bill was the cost of preparing a transcript of the proceedings at the trial. Anderson filed formal objections to the inclusion of this item, on the ground that the cost of a reporter's transcript is not properly recoverable as costs under either the local court rule or general practice, where, as in the instant case, the transcript is not ordered by the court but is prepared for the benefit of the defendant.

Local Rule 56(g)(4) United States District Court for the Western District of Washington;

See, *e.g.*,

Kemart Corp. v. Printing Arts Research Lab., 232 F. 2d 897 (C. A. 9, 1956);

Marshal v. Southern Pacific Co., 14 F. R. D. 228 (N. D. Cal. 1953);

Department of Highways v. McWilliams Dredging Co., 10 F. R. D. 107 (D. C. La. 1950, *aff'd* 187 F. 2d 61);

Republic Machine Tool Corp. v. Federal Cartridge Corp., 5 F. R. D. 388 (D. C. D. Minn., 1946).

Thus, Local Rule 56(g)(4) provides:

"When so ordered by the court or agreed to by stipulation of the parties, the fees of the reporter for taking down testimony and proceedings in court or before a Master or Examiner and for taking down arguments or other matters and for transcribing testimony or proceedings before the court or before a

Master or Examiner and for transcribing arguments or any other matter shall be taxed as costs” (emphasis added). [Tr. Vol. III, p. 556.]

As appears from the affidavits of Stuart L. Kadison, Charles Horowitz and C. Robert Ogden [Tr. Vol. II, pp. 473, 485-486, 489-490] the transcript of the trial proceedings in the instant case was neither ordered by the Court nor agreed to by stipulation of the parties. Rather, a daily transcript was made at the request of General Motors, and portions of it were ordered and paid for by Anderson. Where Anderson ordered and paid for transcript it was charged with 50% of the cost of the original.

Absent, an order of the Court or stipulation relative to the transcript costs, the claimed item of cost was not taxable under the pertinent Local Rule. Accordingly, the Clerk, in taxing costs, refused to allow this item, explaining:

“Neither counsel contend that there was a stipulation regarding the reporter’s fees.

“The words ‘order of the Court’ are simple and suggest a written order or direction, signed by the judge and filed in the case, or an oral order of the judge which is entered on the minutes or is a part of the reporter’s transcript of the proceedings in the cause. Such an order or definite formal direction by the Court should be in the presence of all parties, each of whom thereby has an opportunity to be heard and register his consent or objection thereto. This local Rule was adopted by the judges of this District in 1941 and remains unchanged. Counsel are charged with knowledge thereof and the necessity of complying therewith if they seek to benefit therefrom. They cannot now complain because of their own dereliction.

Absent such an order or stipulation, the item on the Cost Bill entitled 'Court Reporter's Fees' is disallowed" [Tr. Vol. II, p. 496].

Nevertheless, the Court below, on General Motors' Motion to Retax Costs, permitted General Motors to recover the cost of the reporter's transcript making a purported *nunc pro tunc* order [Tr. Vol. II, p. 527], In so doing, the Court disregarded the mandate of local Rule 56(f), which provides, in pertinent part, as follows:

"The motion (to retax costs) will be heard on the same papers and evidence used before the Clerk" [Tr. Vol. II, p. 555].

The trial court's error in this regard should be rectified by this Court.

Conclusion.

Although, as heretofore pointed out, the trial court committed other errors as well, the gravamen of Anderson's claim against General Motors is that General Motors is guilty of fraud by virtue of its non-disclosure to Anderson of General Motors' policy of terminating distributorships, including that of Anderson, whenever it became more profitable to do so. Not only did responsible General Motors' officials stand silently by while Anderson invested substantial sums in his distributorship, but, in fact, they encouraged him to make such expenditures and assured him that he had no need to fear a termination of his distributorship as long as he performed satisfactorily. It was conceded at the trial that Anderson's performance was satisfactory to General Motors, yet General Motors nevertheless terminated the Anderson distributorship in 1953 in accordance with its secret policy, adopted many years before, of which Anderson was justifiably ignorant.

The existence of General Motors' Distributorship Termination Policy and its non-disclosure to Anderson were established to the jury's satisfaction by an overwhelming array of evidence, so that the only remaining issue was *whether General Motors was, as a matter of law, under a duty to disclose its Distributorship Termination Policy to Anderson.*

In light of the complete domination and control which General Motors exercised over Anderson; the closeness and fiduciary nature of their relationship and the resulting trust and confidence which Anderson reposed in his General Motors superiors; the fact that Anderson had no means of learning of General Motors' policy unless it were disclosed to him by his General Motors' superiors; the importance of the policy to Anderson and the disastrous consequences to Anderson which its non-disclosure was certain to bring; we submit that General Motors was, as a matter of law, under a duty to disclose its Distributorship Termination Policy to Anderson. The Court below erred in refusing to so hold, and accordingly the judgment below must be reversed.

Respectfully submitted,

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APPENDIX A

Congressional Findings Re General Motors' Domination and Control of Its Distributors and Dealers.

1. House Report No. 2850, 84th Congress, Second Session (1956), U. S. Code Cong. and Admin. News (pp. 4596-4609) contains the following findings:

"Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises.

". . .

"Although automobile dealers are substantial business men in their local communities, in comparison with the automobile manufacturer, an individual dealer is a small-business man whose size makes it impossible for him to bargain effectively. In contrast with the economic power of each of the automobile manufacturers, the average dealer has an investment in the amount of \$118,000. There are approximately 40,000 franchised automobile dealers in the United States. Roughly one-half, or 20,000, of these

dealers have contracts with General Motors, while 9,000 are franchised by Ford Motor Co.

“While the individual automobile dealer may be classified as a small-business man, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than \$5 billion and employ approximately 668,000 persons.

“Extensive testimony was adduced by the committee at the hearings on this bill with respect to both the contractual relationship between automobile manufacturers and their dealers, and marketing practices current in the automobile industry. Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations made by the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce and by the Sub-committee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

“In 1939, the Federal Trade Commission after an extensive investigation of automobile marketing practices stated:

“The Commission finds that motor-vehicle manufacturers, and by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under, agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report they have been subjected to rigid inspections of promises and ac-

counts, and to arbitrary requirements by their respective motor-vehicle manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidation of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer.

"In connection with its study of the General Motors Corp., the staff of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary reported on automobile distribution systems as follows:

"The franchise system for distribution of automobiles has been described as a system devised by the automobile manufacturers to secure maximum rights with a minimum of liability * * *. It may be defined as an agreement by which the manufacturer appoints the dealer to handle his line, and the dealer, in return for this privilege, agrees to conduct his business according to the standards and desires of the manufacturer. It is the method by which the manufacturer assures himself of control over the distribution of his product in what amounts to quasi-integration to the retail level of distribution. The manufacturer can maintain this control because of his superior economic position which he retains by threat of franchise termination." (pp. 4596-4598).

"In various suits in the past, General Motors has characterized its dealer franchise as follows:

- "1. That it does not constitute a legal contract;
- "2. That it lacks mutuality, and represents no legally enforceable obligation on the part of the seller to sell or on the part of the dealer to buy; 4598

"3. That it provides that the dealer shall perform to the satisfaction of the seller, and that the question of satisfaction is for the seller alone to determine;

"4. That no damages are recoverable by the dealer since loss of profits was not contemplated by the parties;

"5. That it is unenforceable and void because of indefiniteness, uncertainty, and lack of consideration;

"6. That, if valid, the agreement gives the factory the right to terminate at will.

"With few exceptions, the courts have sustained the manufacturer's interpretation of the agreement, and the courts have held that dealers fail to state a cause of action when suit is brought on the agreement alone.

"The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchise dealers. A primary source of the manufacturers' power over their dealers stems from the unilateral nature of the franchise agreements. (p. 4599)*

2. Bigness and Concentration of Economic Power— A Case Study of General Motors Corporation.

Staff Report of the Subcommittee on Antitrust and Monopoly of the U. S. Congress Senate Committee on the

*On the basis of this report legislation was enacted which provides in part:

"An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer;" 15 U. S. C. Sec. 1222.

Judiciary, 84 Congress, First Session (1956) contains the following findings (pp. 76-81, 86-89):

“ . . . General Motors as the largest manufacturer in the United States deals with about 18,000 individual dealers handling its passenger cars and trucks. A relationship in which all the economic power rests with one party lends itself to inequities (p. 76).

“ . . .

“ . . . This contest for market preeminence between General Motors and Ford dramatized that the ‘independence’ of the dealer is more theoretical than real. Being completely dependent upon the factory, his position is more analogous to that of an employee.

“ . . .

“ . . . The heart of the matter appeared to be in the nature of the dealer franchise and the inequitable manner in which it permitted the manufacturer to control the dealer’s economic life” (p. 77).

“ . . .

“ . . . The manufacturer felt the need to control the merchandising of his product, established standards of dealership operations, advertise and carry on market research. For these operations to be successful, direct association with the dealer was necessary and the wholesale distributor’s function became a positive barrier to successful control over distribution.

“Displacement of the wholesaler began quite early, although for some firms he remained the major distribution conduit until the recent war. Today, however, he exists as an important factor only in the case of low-volume car lines and in foreign operations. The manufacturer today generally deals directly with the retail dealer.

“ . . . Secondly, to each dealer each of the producers is an industrial giant. The wholesale distributor perhaps had economic power vis-a-vis the producer, but the individual dealer has little. . . .” (p. 78)

“ . . .

“The control exists because the dealer franchise does not represent the free will of the parties as do ordinary contracts. Professor Hewitt asserted that at any given time a majority of the dealers are already economically committed to one manufacturer, and thus have no practical choice but to accept any terms the manufacturer imposes. By way of illustration, he pointed to General Motors’ change from a continuing agreement to a 1-year agreement. The dealers objected to the change but had no choice in the matter because their investment committed them to one manufacturer (VII, 3203).

“Most critics of the factory-dealer franchise system agree that the faults of this system are directly attributable to the superior market position of the manufacturer. The economic strength of the manufacturer manifests itself in two principal ways:

“(1) Control and supervision over the dealer’s business.

“(2) Power to terminate or to refuse to renew the dealer’s franchise.

“Threat of termination which the manufacturer holds over the dealer, once the latter commits himself to the requirements for entry into the industry, permits the manufacturer to control the dealer and his operations. The

dealer accepts this relationship in the expectation that it will be profitable. He later can reconsider his decision only with the knowledge that his business is specialized in nature and his capital not readily transferable to alternative uses. The threat of termination, therefore, makes him a pliable tool.

“Criteria for the relationship between General Motors and its dealers are determined by the former. . . .” (p. 81)

“ . . .

“The manufacturer, using the threat of termination, has imposed controls upon the conduct of the individual dealership. These controls, explicitly detailed in the selling agreement, affect the capital the dealer shall supply, his building, his sales staff, and almost every phase of his operations. Violation of any of these provisions is cause for termination of the dealer franchise. Many of these provisions are discussed in the Subcommittee’s hearings. They give the manufacturer a measure of control over the resale of his product which is unknown in other industries” (p. 86).

“ . . .

“Other dealers charged that upon various occasions they were requested by the factory to add new buildings, remodel, or completely renovate their premises. The threat of termination frequently left the dealer little option in the matter.

“The agreement requires the dealer to maintain a place of business satisfactory to the manufacturer, including

salesroom, service facilities, sales staff, and mechanical staff, and gives the manufacturer the right to inspect those facilities. . . ." (p. 87).

“ . . .

“The selling agreement contains a further control device over dealers in the form of a uniform accounting system prescribed by General Motors and the requirement of monthly financial reports, 10-day reports, and sales and service records. . . .

“These provisions provide the manufacturer with a complete picture of the operation and financial status of the dealer at all times, including his unit profits and trade-in allowances” (p. 88).

“ . . .

“The agreement provides for an advertising fund, which represents the assumption of additional managerial prerogatives by the manufacturer” (p. 89).

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BRIEF OF APPELLEE

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No. 16013

IN THE
UNITED STATES
COURT OF APPEALS
For the Ninth Circuit

ABC PACKARD, INC.

Appellant,

VS.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

PRELIMINARY

This is an appeal from a judgment entered upon a jury verdict in favor of the appellee, General Motors Corporation, in a fraud action brought by appellant, A. B. C. Packard, Inc., formerly called Anderson Buick Company, in the United States District Court for the Western District of Washington, Northern Division.

The Proceedings Below

The case was tried before Honorable Sylvester J. Ryan, Senior Judge of the United States District Court for the Southern District of New York, sitting by assignment, and a jury.

The Court's charge to the jury was prepared with extreme care over an extended period of days and in consultation with counsel for the parties (Tr. Vol. VI, p. 2238). Counsel for both parties were in complete agreement with the entire charge, as finally given to the jury, with the exception of those points to which they took specific and formal exception (Tr. Vol. VI, pp. 2238-56; 2428-30).

The jury returned a general verdict in favor of appellee and answers to interrogatories submitted to it by the Court (Tr. Vol. II, pp. 500-503, Vol. VI, p. 2457).

After entry of the verdict, the Court stated that the verdict was in accord with the Court's own views and read to the jury an opinion prepared in connection with appellee's motion for a directed verdict, upon which decision had been reserved. (Tr. Vol. VI, pp. 2468-79; 154 F. Supp. 927).

On September 4, 1957 appellant filed a motion for a new trial. The motion was submitted, without oral argument, on the comprehensive briefs of the parties. The Court's opinion, denying the motion (161 F. Supp. 668) appears at pages 504-25, of Volume II, of the record.

STATEMENT OF FACTS

A. Appellant's "Statement of the Case" Is Not To Be Relied Upon and Is Controverted by the Appellee

The appellant's "Statement of the Case" (Br. pp. 3-38) is little more than a thinly disguised argument that the verdict was against the weight of the evidence.

At the outset, appellant states that its appeal is

not on the facts and that only questions of law are presented and that appellant proposes to rely upon uncontroverted facts.

Appellant further states (Br. p. 4) :

“We propose to rely primarily upon uncontroverted facts, which we believe will demonstrate an extremely close and dependent relationship * * *. This relationship can be shown we believe, through the testimony of General Motors’ own officers and employees.”

What follows is a 40-page paraphrase of appellant’s argument to the jury in which appellant construes all evidence in the light most favorable to it, draws all inferences in its favor, resolves all issues of fact in its favor, ignores all embarrassing aspects of its own case, and disregards the appellee’s evidence in its entirety, except that isolated fragments of testimony are seized upon and sought to be construed as “admissions.”

Far from relying on “the testimony of General Motors’ own officers and employees”, the record citations made in support of appellant’s assertions refer, in the overwhelming majority of instances, to the virtually uncorroborated testimony of Mr. M. O. Anderson, president of the appellant corporation. Mr. Anderson’s testimony was sharply controverted in every material particular by the contemporaneous documents in evidence and by the testimony of appellee’s witnesses.

The fundamental error that pervades appellant’s statement of the case is that appellant refuses to recognize or to accept the decision of the jury that it did not believe Mr. Anderson or his witnesses on the absolutely fundamental issues of this case, and

that it did believe appellee's witnesses and the documentary proof.

To display to this Court the entire area of the conflict in the trial testimony or even to show in full the testimony conflicting with the testimony referred to under the various rubrics of appellant's statement of the case would require a brief of inordinate length. We propose, in the interest of brevity, to set forth a short Statement of Facts as the jury were entitled to and did find them, and then point out (*infra*, pp. 14-37) some of the more glaring examples of omission and distortion of evidence which are to be found in appellant's statement of the "uncontroverted facts" allegedly taken from the "testimony of General Motors' own officers and employees."

B. Statement of Facts

1. *Historical Distribution System in Automobile Industry*

In the early days of the automobile industry the conventional method of distribution was through wholesale dealer-distributors located in the larger population centers. The dealer-distributors purchased automobiles from the manufacturers in quantity lots sufficient to supply the demand of their own retail customers and also the needs of the local automobile dealers located in the dealer-distributor's territory. On the wholesale transactions the dealer-distributor was given a small fixed "override" which in the case of Buick amounted to between \$35 and \$50 on each car distributed to a retailer, as compensation for the wholesale function (Tr. Vol. V, pp. 1905-06, 1860).

In the 1930s as the market expanded it became apparent that the wholesale function of the dealer-distributors was an economic luxury and that the manufacturers themselves could distribute more effectively and economically directly to the retail dealers. This elimination of the middleman in the distribution pattern became a trend in the late 1930s.

Following the war, the trend was resumed and during the 1940s wholesale distribution direct to dealers was undertaken entirely by Studebaker, Nash, Packard, Chrysler and by Pontiac Division of General Motors, and partially by Cadillac and Buick Divisions of General Motors.

In the early 1950s, Buick Division changed to direct distribution throughout the country with the exception of Saginaw, Michigan.¹

(Def. Exs. A-52, A-53, A-54, A-55, A-56, A-57, A-58, A-59, A-60, A-61, A-62, A-63, A-64; Tr. Vol. V, pp. 1859, 1877-1907; Pl. Ex. 81, Tr. Vol. III, pp. 1069-74; Pl. Ex. 8, Tr. Vol. II, pp. 658-60).

There were many reasons for the elimination of the dealer-distributor as a middleman between the local retail dealers and the factories. With the growth of volume, dealers' profits expanded to the point that they became financially independent and they were able to operate their businesses without the assistance that had been given to them in the early days by the distributors. From the dealers'

¹From the outset appellant conceded that General Motors had the "legal right to change its distribution pattern"; that such change "is not deemed actionable" and that "General Motors may distribute its products as it sees fit so long as its policies do not conflict with the public interest." (Tr. Vol. II, p. 506.)

standpoint, the distributors were simply no longer needed. (Tr. Vol. V, p. 1905).

From the manufacturer's standpoint, it was found that the expanded market could be best and most economically served, from the standpoint of service to the retail customer, by a system that permitted direct dealing with the retail outlets. (Tr. Vol. VI, pp. 2096-97).

Mr. Hufstader, Vice President of General Motors in charge of distribution, described the manufacturer's viewpoint (Tr. Vol. V, p. 1906).

2. The establishment of Anderson Buick Company

(a) Background

M. O. Anderson, president of appellant corporation, entered the automobile business in 1928 at Spokane, Washington, as a retail car salesman and was thereafter continually engaged in the automobile business. For a period of several years he was employed by appellee as a Zone Manager of one of its car divisions, and served in several executive capacities with the Motor Holding Division of General Motors (Tr. Vol. III, pp. 825-33).

Prior to 1936, Buick Motor Division distributed its products in Washington through Eldredge Buick Company, a large dealer-distributor located in Seattle. In 1936, Eldredge retired and it was decided to establish several small dealer-distributorships to serve the territory, one of which was to be located in Seattle.

Mr. W. F. Hufstader, Sales Manager of Buick, called Anderson on the telephone and offered the Seattle contract to him. Later Anderson called

Hufstader back and told him that he wished to accept the offer (Tr. Vol. V, pp. 1855-56).

Mr. Anderson then made application to the Motor Holding Division of General Motors for financial help and the Anderson Buick Company was formed under a plan designed by General Motors to assist qualified individuals to become automobile dealers. General Motors contributed \$67,500 of the capital and received the Class A stock of the corporation; Mr. Anderson contributed \$7,500 and received the Class B stock. The parties then entered into an agreement under which Mr. Anderson agreed to purchase the Class A stock held by General Motors out of the earnings of the business (Tr. Vol. III, pp. 837, 846-48).

The Buick Division of General Motors then entered into a dealer-distributor selling agreement with Anderson Buick Company for the Seattle area (Def. Ex. A-6, Tr. Vol. IV, pp. 1173-77).

By October 31, 1940, Anderson Buick Company had purchased all of the Class A stock held by Motor Holding Division and on that date the corporation was dissolved and the business operated thereafter as a sole proprietorship of M. O. Anderson (Tr. Vol. III, p. 847).

Early in 1942, Mr. Anderson again applied to Motor Holding Division for a capital contribution. On March 30, 1942, Anderson Buick Company was again organized and M. O. Anderson and Motor Holding Division each contributed \$30,000 under an arrangement identical in all material respects with the 1936 arrangement (Tr. Vol. III, pp. 850-52).

By December 31, 1945, Anderson had purchased

all of the shares held by Motor Holding Division and he thereupon became the sole stockholder of Anderson Buick Company and General Motors has not since that date owned any of the shares of its stock, had any other financial interest in that Company or any representation in its management (Tr. Vol. III, pp. 852-53).

(b) *The Contracts*

During the entire period of appellant's operation, the relationship between the parties was governed by written contracts which were identical in all respects with the contracts of all other Buick distributors in the United States. These contracts spelled out in detail the rights and obligations of each of the parties (Def. Exs. A-6 to A-17, Tr. Vol. IV, pp. 1172-73; Def. Ex. A-29, Tr. Vol. IV, p. 1264).

A copy of the last contract entered into between the parties appears at pages 52-98 of Volume I of the record.

Although appellant contended that these contracts were entered into as a result of business compulsion and were induced by fraud, the jury has specifically found that each was entered into as the free act of the parties, none was executed as a result of "business compulsion", and none was tainted by fraud of any kind (Tr. Vol. II, pp. 502-03).

Many of the elements in the relationship between the parties, which appellant now labels "control devices" used by appellee to dominate and control the appellant's business (Br. pp. 8-18), are to be found in the express undertakings of these agreements.

After 1947, each agreement was for a stated term

of one year and each was cancellable by the distributor on 30 days' notice without cause; and cancellable by the manufacturer on 90 days' notice if the distributor failed to meet the operating requirements of the contract, and immediately if the distributor died or became insolvent (Tr. Vol. I, pp. 53, 83-86).

The agreements further provided that the distributor was not the agent or legal representative of the manufacturer for any purpose whatever; that the distributor was solely responsible for obligations and liabilities incurred in the performance of the contract unless the manufacturer agreed to assume such obligations by written agreement executed by its General Manager or General Sales Manager (Tr. Vol. I, p. 95); and that there were no other agreements or understandings, either oral or in writing, between the parties relating to the sale or servicing of Buick motor vehicles (Tr. Vol. I, p. 97).

In commenting on these contracts, the Trial Court, after recording the jury's verdict, said (Tr. Vol. VI, pp. 2474-75):

"The compulsive force of these agreements and of the action of the parties under them leads the Court to conclude as a matter of law that the relationship between the parties was not such as placed defendant in a position of superiority and influence where it controlled the action and decision of the plaintiff and created a relationship of trust and confidence which impelled the disclosure of any policy which indicated the ultimate and certain discontinuance at an indefinite date in the future of plaintiff's distributorship.

"This is especially so when considered in light

of the provisions, repeated through the years, which granted plaintiff the right to cease to continue as distributor at any time, for [no] cause, upon thirty days notice. No relationship of trust and confidence existed as a matter of law.

"The Court will assume arguendo that such a relationship of trust and confidence did, nevertheless, exist.

"The agreements lead irresistibly to the conclusion as a matter of law that plaintiff cannot maintain that it took action in ignorance of an undisclosed policy which it would not have taken had the policy been disclosed or known to it. In this consideration, we do not weigh the plaintiff's long years of active experience in the automobile industry, his active participation on trade associations or his wide reading of trade publications. We are, nevertheless, led to these conclusions by reason of the repeated inclusion throughout the years of provisions of time limitation upon the term of the distributorship, by the provisions that the agreements contain and embody all the understandings between the parties, by the provision limiting authority to modify to defendant's two specified officers, and by the consistently manifested policy of the defendant not to grant agreements for more than one year."

3. *Financial History of Anderson Buick Company*

The Anderson Buick Company was an extremely profitable undertaking. From his original investment of \$7,500 Mr. Anderson individually realized by way of salary, bonus, withdrawals, dividends capital gains on sale of property, rental income and increase in net worth, the sum of \$2,642,131 (Tr. Vol. IV, pp. 1319-20).

On December 31, 1936, the corporate net worth

was \$75,657.97, of which General Motors had contributed \$67,500. On June 30, 1953, the corporate net worth was \$1,248,037.97. (Pl. Ex. 104, Tr. Vol. IV, pp. 1541-42).

These large sums were realized largely from the retail operations of Anderson Buick Company. During the years 1950, 1951 and 1952, the only years in which appellant maintained sufficient records to permit a detailed analysis, the average gross profit per new car sold *at retail* was \$575, and the average sold *at wholesale* was \$47 (Def. Ex. 45, Tr. Vol. V, pp. 1763-64).

Net profits before bonuses and income taxes shown on the financial statements submitted to Buick Motor Division were derived as follows (Def. Ex. 49, Tr. Vol. V, pp. 1772-74):

Year	Retail Operations	Wholesale Operations
1950	\$592,112	\$ 21,643
1951	223,983	(17,826) *
1952	43,668	(9,439) *
		*Loss

Thus for the three-year period 1950-52, according to the financial statements, *retail operations produced a net profit of \$859,763 and wholesale operations a net loss of \$5,622.*²

²An audit of appellant's books made, at the request of General Motors for the purpose of this trial, by Lybrand, Ross Bros. & Montgomery, independent certified public accountants, showed a small variation, arising from post closing adjustments, in the net profit figures as shown by the financial statements submitted to General Motors and the net profit figures in appellant's books.

The audited figures are as follows (Def. Ex. A-51, Tr. Vol. V, pp. 1839-40): net profit from retail operations \$942,081; net profit from wholesale operations \$6,743.

4. *Buick Studies and Decision re Northwest Distributors*

Buick Motor Division from time to time over the years made studies of the relative advantages of factory distribution over private distribution (Pl. Ex. 81, Tr. Vol. V, pp. 1877, 1929-31).

Mr. Wiles, General Manager of Buick from November 1, 1948 through March 1956 when he became Executive Vice President of General Motors (Tr. Vol. VI, p. 2169), testified that the manner of distribution was exclusively within his province to decide (Tr. Vol. VI, p. 2197). He made the decision to change the method of distribution in the spring of 1952 (Tr. Vol. VI, p. 2197).

He testified that the principal considerations were the prospective ending of the Korean War, the removal of production restrictions and the pent-up consumer demand which would result in a substantial increase of production. He took into account the fact that a distributor received a maximum gross profit of "some \$35 to \$50 a car which was the amount of our override to a distributor when he made sales to his dealers" (Tr. Vol. VI, p. 2199), compared with the "between five and six hundred dollar per car" on dealer sales to customers. Thus the growth in post-war production and sales would produce "greater sales and profit opportunity" in terms of a retail dealership "than they (the Northwest distributors) were currently experiencing" (Tr. Vol. VI, p. 2200). This, combined with the trend in the industry toward a more effective method of distribution from the customer, dealer, and manufacturer standpoints, resulted in his decision to effect the change in the Northwest (Tr. Vol. VI, p. 2200).

5 Offer to Anderson Buick Company and Its Response

On July 10, 1952 at a meeting held in Portland, Mr. A. H. Belfie, General Sales Manager of Buick, advised the five Northwest distributors that on the expiration of their then current distributor agreements on October 31, 1952, Buick would offer each of them a new distributorship agreement for a term expiring June 30, 1953, and that after that date relationships with all five would be on a direct dealer basis (Def. Ex. A-68, Tr. Vol. VI, p. 2105).

This advance notice of one year was given so that appellant might have adequate time to plan accordingly (Def. Ex. A-67, Tr. Vol. VI, pp. 2097-98). Thereafter, on November 1, 1952, distributor agreements were entered into with all of the distributors, including Anderson Buick Company, which agreements expired by their terms on June 30, 1953.

On May 22, 1953, Mr. Belfie wrote to appellant, among others, and advised it that Buick would offer it a direct dealer selling agreement, in the form then in effect with all Buick dealers, for a term beginning on July 1, 1953 and invited them to a meeting on June 9, 1953 at Seattle (Def. Ex. A-69, Tr. Vol. VI, p. 2108). Four of the distributors accepted direct dealer selling agreements (Def. Ex. A-78, Tr. Vol. VI, pp. 2189-96). Appellant alone rejected the offer (Def. Ex. A-70, Tr. Vol. VI, pp. 2113-14; Tr. Vol. IV, p. 1311), although it was offered an exclusive franchise for the City of Seattle (Tr. Vol. VI, p. 2155).

Although repeated efforts were made by Buick to persuade appellant to accept a dealership contract (Tr. Vol. VI, pp. 2144-49, 2110-12; Def. Ex.

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Although repeated efforts were made by Buick to persuade appellant to accept a dealership contract (Tr. Vol. VI, pp. 2144-49, 2110-12; Def. Ex.

A-71, Tr. Vol. VII, pp. 1113-17). Mr. Anderson refused to consider the offer unless he was given special consideration of an undefined nature. Instead, he instituted negotiations with the Chrysler Corporation for a DeSoto-Plymouth distributorship for a geographical area larger than that embraced in the Buick agreement. These negotiations resulted in a DeSoto-Plymouth distributorship which began operations in mid-August, 1932 (Tr. Vol. IV, p. 1296).

In March of 1934, a Packard distributorship was also undertaken (Tr. Vol. IV, p. 1298).

After the expiration of the Buick distributorship agreement on June 30, 1933, General Motors, in discharging in full each and every obligation imposed on it by the terms of the expired agreement (Tr. Vol. IV, p. 1241) paid Anderson Buick Company the sum of \$145,112.38 (Def. Ex. A-75, Tr. Vol. VI, p. 2153).

C. Omissions and Distortion of Facts in Appellant's "Statement of the Case"

1. *Alleged Pre-contract Representations as to Tenure*

Appellant's brief asserts (p. 4) that Mr. Anderson received assurance before he commenced operations as a dealer-distributor that he "need not concern himself about tenure so long as he did a proper job" and cites in support of this contention Mr. Anderson's testimony (Tr. Vol. III, pp. 834-837) and that of appellee's witness W. F. Huffstader (Tr. Vol. V, pp. 1354-56).

Mr. Huffstader testified that he had no conversations regarding the tenure of the distributorship

with Mr. Anderson (Tr. Vol. V, p. 1857). See also Tr. Vol. V, pp. 1871, 1910.

2. *General Motors' Alleged Control of Anderson Policies*

Appellant's contention that General Motors controlled appellant's policies is advanced on three footings (Br. pp. 4-6): first, that before new facilities could be acquired or existing facilities disposed of, appellant was required to obtain the advice and approval of responsible General Motors' officials; second, that in 1950 appellant lost the opportunity to make a highly profitable sale of the main facilities for \$850,000 because Mr. Nash, the Regional Manager for Buick, suggested there be no sale; and third, that in 1951 Mr. Belfie, the General Sales Manager, advised against a promotional program then under consideration.

The first two of these assertions are demonstrably untrue; the third is completely without probative value.

(a) *Facilities*

The contractual obligation of the appellant in respect of facilities was contained in each of the eighteen contracts executed by the parties. It was, in substance, that the distributor would maintain new and used car facilities satisfactory to Buick Motor Division. (See Article 12, Tr. Vol. I, p. 70).

Appellant asserts that, except for the West Seattle property, it obtained the advice and approval of General Motors officials before acquiring or disposing of any of its facilities.

There was a sharp and extensive conflict between

the testimony of appellee's witnesses and that of Mr. Anderson on the issue of facilities. Appellee's witnesses testified that they generally learned of appellant's various building programs after the property had been purchased or construction was under way and that neither Mr. Anderson nor anyone else connected with appellant sought or required the approval of Buick Motor Division (Pl. Ex. 40, Tr. Vol. III, p. 861; Nash, Tr. Vol. V, pp. 1987, 1993-95, 1997-98; Belfie, Tr. Vol. VI, p. 2094; Hufstader, Tr. Vol. V, pp. 1862-63; Kennard, Tr. Vol. VI, pp. 2167-68; Nash, Def. Ex. A-64, Tr. Vol. V, p. 1993; Ruhe Dep., pp. 34, 51-52, Tr. Vol. III, p. 812. See also colloquy between counsel for the plaintiff and the Trial Judge, Tr. Vol. III, p. 990; C. H. Anderson, Tr. Vol. IV, pp. 1423-24; M. O. Anderson, Tr. Vol. III, pp. 1102-04, 1133-35, Vol. IV, pp. 1221-22, Def. Ex. A-24, pp. 1223-24).

There were diametrically opposed versions, which the jury had before it, between Mr. Anderson's account of his property acquisitions which he gave on the trial and the account he gave in his deposition before trial. On the trial he testified that he was required to and that it was his policy and practice to discuss any expansion program with Buick Division (Tr. Vol. III, pp. 1134-35). In his pre-trial deposition he testified exactly to the contrary. (Dep. p. 111, Line 16, Tr. Vol. III, pp. 1138-40):

Mr. Anderson:

"Of course, Mr. Counsel, you want to remember that all these facilities that you talk of were facilities for the Anderson Buick Company operating as a dealership under the Anderson Buick Company operating as a distributor, and we as a distributor were not required to report

to the central office on any of these changes because the contracts were in our own files and they were held by us as a distributor."

In respect of the West Seattle property, appellant asserts (Br. p. 5) that it "was severely censured and was not permitted to use such facilities until the approval of Albert H. Belfie, Buick General Sales Manager, was obtained." In support of this assertion, appellant cites the testimony of Mr. Nash (Tr. Vol. V, p. 2022; Tr. Vol. VI, p. 2052), Regional Manager of the Buick Motor Division of appellee. The testimony referred to contains not one word of criticism, much less "severe censure," and shows that the West Seattle property was already in use and operation, and that Mr. Nash complimented Anderson as to its appearance.

Mr. Anderson's version of the establishment of the West Seattle branch (Tr. Vol. III, pp. 954-56) agrees generally with that of Mr. Nash and flatly contradicts the assertions on pages 5 and 6 of appellant's brief.

(b) *The Alleged Lost Opportunity to Sell the Main Facilities.*

The second argument advanced in support of appellant's contention that General Motors controlled appellant's policies is that appellant lost the opportunity to make a highly profitable sale of the main facilities for \$850,000 because Mr. Nash suggested there be no sale. (Br. p. 6). *This assertion is categorically contradicted by every witness who testified, including Mr. Anderson, and by the contemporaneous documents.*

Mr. Nash testified (Tr. Vol. V. p. 2003) :

A. Mr. Anderson never discussed with me

the sale or the prospective sale of his property in Seattle.

The Court: Did anybody else connected with Anderson Buick discuss that matter with you?

The witness: No, your Honor."

Mr. Anderson testified that he had asked McLaren, Goode, West and Company, appellant's independent certified public accountants, to explore the possibility of liquidating the corporations in order to get the cash proceeds into his possession (Tr. Vol. IV, p. 1244) and had particularly asked them to study the tax effect of the proposed sale. The accountants submitted a written letter opinion (Def. Ex. A-28, Tr. Vol. IV, pp. 1243-50) which strongly advised against the sale of the properties because of the \$325,000 tax consequence and because of various other financial disadvantages to the corporation.

Mr. Anderson further testified that after receiving the letter opinion of his accountants he communicated with his real estate broker (Tr. Vol. IV, p. 1250):

"Q. Didn't you tell him in view of the letter and the tax you were not interested in selling the property?

A. Yes, I did, yes."

The real estate broker handling the transaction testified (Tr. Vol. V, pp. 1720-26) that he agreed with Mr. Anderson's decision not to sell the property. He stated (p. 1722):

"Q. No; you don't recall what Mr. Anderson said?

A. That he couldn't make the deal and lose

that much money out of the purchase price of \$850,000.

Q. What did you say?

A. 'I don't blame you at all. I wouldn't either.'"

(c) *Alleged Advice in 1951 Against a Promotional Program.*

The third basis for appellant's contention that General Motors controlled appellant's policies is that in 1951 Mr. Belfie, General Sales Manager of the Buick Division, advised Howard Anderson against a promotional program then under consideration by appellant (Br. p. 6). Mr. Belfie testified that he advised (Tr. Vol. VI, p. 2093) against spending \$20,000 on a raffle at a time that the appellant was seeking to reduce expenses.

The record is silent as to whether appellant actually desisted from the raffle because of Mr. Belfie's advice, although Mr. Howard Anderson testified at length (Tr. Vol. IV, pp. 1357-1440).

3. *The Alleged Buick "Chain of Command"*

This epithetical expression came into the case during the pre-trial examination of the witness Belfie. At the trial, on cross-examination, the witness was asked (Tr. Vol. VI, pp. 2130-31):

"Q. Now, there is an organizational chain of command in the Sales Department of Buick Motor Division, is there not?

A. Well, we don't call it a chain of command. We call it an organization chart.

Q. Well, have you ever called it a chain of command?

A. Once.

Q. When was that?

A. In my deposition in Detroit, when you took it from me. You started by telling me about a chain of command, and the next thing I knew you had me saying 'chain of command.'

The Court: It's the power of suggestion."

4. *General Motors' Alleged Control of Anderson Buick Company*

Appellant argues, with liberal use of colorful phraseology and without record references, that Buick Division achieved complete domination of the activities of appellant by use of what appellant calls "control devices." These alleged devices are said to be: inspection of facilities, meetings, reports and the use of a Zone Manual (Br. pp. 4-14).

The jury had before it appellee's explanation of all of these matters and also other evidence as to the manner in which appellant and appellee operated in their dealings. This evidence completely negates the inferences which appellant seeks to draw and shows that these so-called "devices" were nothing more than routine efforts to render assistance to appellant in the conduct of its business.

In respect to these matters, the Trial Court observed (Tr. Vol. II, p. 518, 161 F. Supp. 668, 674):

"The evidence presented a sharp conflict as to the manner in which plaintiff corporation and defendant operated in their dealings. This conflict also extended to the matters on which plaintiff claimed it sought or received help, assistance, advice or guidance from the defendant."

A single reference will suffice to show the extent

to which appellant distorts the record in an effort to sustain its groundless inferences.

Appellant characterizes (Br. p. 14) the General Motors Zone Manual as still another "control device," containing various "unilaterally devised" requirements with which "Anderson and other distributors were required to comply." Failure to so comply, asserts appellant, resulted in censure, the "degree of censure depending on the area of non-conformity." One record reference is cited as support of this statement (Hufstader Dep. p. 387). This reference shows that the witness stated the distributor "wasn't required to conform; it (the Zone Manual) was sent to him as a matter of information." At no place in this testimony is there any reference to "censure" or required compliance with the Zone Manual.

Appellant advances three "illustrations" of the alleged use of the so-called "control devices":

(a) *Alleged Pressure to Increase Working Capital*

Appellant asserts that General Motors exerted constant pressure on appellant to increase its working capital even though appellant considered its working capital sufficient for its own needs, and that this pressure finally forced appellant to borrow \$500,000 "in order to obtain the cash position which General Motors had ordained." (Br. pp. 14-15).

The answer to this first "illustration" of "domination and control" is five-fold: (a) Appellant by contract agreed with appellee that it would provide working capital in a stated amount (Sec. 14 of Dis-

tributor Selling Agreement. Tr. Vol. I, p. 71; also see Agreed Capital Standards Agreement, Pl. Ex. 70, Tr. Vol. III, p. 1004); (b) at all times postwar, appellant's capital was completely inadequate and for a period was actually in the red because of heavy withdrawals and speculations in California and Washington real estate and other ventures unconnected with the automobile business (the Palm Springs speculations alone in the year ending April, 1952, involved \$314,282) (Pl. Ex. 21; Def. A-23; Tr. Vol. IV, pp. 1206-16); (c) Anderson acknowledged under oath that the working capital of the appellant was inadequate (Tr. Vol. III, p. 908) and that the amount established by appellant was entirely reasonable. (Tr. Vol. III, pp. 908, 993); (d) the \$500,000 loan was used to pay obligations to banks and others (Tr. Vol. III, p. 1148; Def. Ex. A-5, Tr. Vol. III, p. 1160; Def. Ex. A-27, Tr. Vol. IV, pp. 1232-33; 1208-10); and (e) appellant's own exhibit shows that the necessity for the loan did not arise from anything said or done by General Motors but arose because of appellant's activities in the retail finance business (Pl. Ex. 28, Tr. Vol. III, pp. 806-808; Def. Ex. A-25, Tr. Vol. IV, pp. 1217-18).

The jury had before it varying versions as to why the \$500,000 was borrowed and none of them had anything to do with appellant's cash position.

Mr. Anderson testified in response to questions by the court (Tr. Vol. III, p. 1148):

"The Court: July 11, 1952. Did I understand you to say that when you secured the mortgage of one half million dollars on January 5, 1952, that with that money you liquidated the loans, two loans, to the banks?

"The Witness: That is correct, your Honor.

"The Court: So that it is fair to say then that in the latter part of January, 1952, your indebtedness to the bank had been fully paid?

"The Witness: That is correct, your Honor.

"The Court: And in the next six months did your indebtedness to the banks arise to \$400,000?

"The Witness: We had some additional investments, real estate, and we—

"The Court: No, I simply ask you.

"The Witness: Yes, it did; it did, yes."

Appellant's application to the Massachusetts Mutual Life Insurance Company for the loan dated October, 1951 (Def. Ex. A-5, Tr. Vol. III, p. 1160) stated that the purpose of the loan was:

"To retire short term indebtedness."

Mr. Anderson advised his certified public accountants, Haskins & Sells, in a letter dated August 12, 1952 (Def. Ex. A-25, Tr. Vol. IV, pp. 1217-18):

"After all the purpose of the loan was for financing paper, and as A.B.C. is handling the paper, it would only seem logical that they should carry the liability."

The use to which the \$500,000 was put was described by Mr. Anderson (Tr. Vol. III, pp. 1162-63, 1208-10, Def. Ex. A-27, 1232).

It will be seen that the money was not, as alleged in appellant's brief (pp. 15-16), borrowed "to obtain the cash position which General Motors had ordained" for appellant nor was any part of it used for that purpose.

Finally, the desire for the \$500,000 loan arose as a result of appellant's own conduct, the loan was obtained in the exercise of its independent business judgment, and the receipt of the money did not affect appellant's operating cash position in any way. This is made crystal clear by the following language in Plaintiff's Exhibit 28 (Tr. Vol. III, pp. 806-808) which was read to the jury *by appellant's counsel*:

"It does not work to increase their operating cash, and there is always the danger that if they continue to finance their paper themselves they again may find themselves owing a sizeable amount of short term paper which, as we analyze their present balance sheet, is the difficulty today." (Emphasis supplied).

(b) *Alleged Pressure to Expand Facilities*

The second "illustration" of the alleged use of "control devices" by General Motors to achieve "domination and control" of appellant is the allegation that (Br. p. 16):

"In line with this policy Anderson, along with other dealers and distributors, was constantly urged to expand his sales and service facilities."

The complete answer to this contention is contained in Defendant's Exhibit A-64 (Tr. Vol. V, p. 1993) which is a letter addressed by Buick Motor Division to appellant under date of July 9, 1947, long before there was any intimation of the present lawsuit. Exhibit A-64 states:

"The Buick Motor Division has been very careful not to require or even suggest to dealers that they spend too much of their money on new buildings***."

The reasons advanced by Mr. Anderson at the

trial for the expansion of appellant's facilities was (Tr. Vol. III, p. 1114) "we were ambitious and needed more space *** for the expanding market" and that the City required a fireproof paint shop.

See also Def. Ex. A-24, Vol. IV, p. 1221.

(c) *Alleged "Blunt Order" to Mr. Anderson Not to Run for a Second Term as President of N. A. D. A.*

Appellant's third "illustration" of "domination and control," cited as "the most dramatic illustration" of the threat of force by appellee in its efforts to dominate appellant's business, is Mr. Hufstader's alleged "blunt order" to Mr. Anderson in early 1948 (Br. p. 17) that he not run for a second term as president of the National Automobile Dealers Association in 1948 in spite of Mr. Anderson's "great desire to do so."

This is a complete distortion of the record. Mr. Anderson testified (Tr. Vol. III, p. 894):

"Q. Do you recall having a conversation with Mr. Hufstader, whether you should run again for the national presidency of the N.A.D.A.?"

A. Mr. Hufstader told me *he thought maybe I was neglecting business and I should stay home and tend to business*, rather than being president of N.A.D.A.

Mr. Hufstader testified (Tr. Vol. V, p 1864):

"*** the second item that I wanted to discuss with him was *to ask him* very definitely not to stand for re-election as President of the National Automobile Dealers Association; not that we had any particular fuss with them, but because I felt very definitely that his business here in Seattle needed his undivided time and

attention, and particularly in light of the fact that that was one of the stipulations of the selling agreement.”

The contract between the parties provided (Tr. Vol. I, p. 70) :

“11. Each person named in Paragraph Third of this Agreement shall devote his full time, attention and energy to the conduct of the distributorship business.”

At the time Mr. Hufstader gave this advice in January, 1948, Mr. Anderson had completed a term as Vice President of the Dealers Association which had necessitated his absence from Seattle for extended periods. During 1947, he served as President of the Association which necessitated his absence from Seattle for even more extended periods. (Tr. Vol. IV, pp. 1224-25).³

As to whether Mr. Anderson had any desire “great” or otherwise to run for re-election, the record is silent.

The implication (Br. p. 18) that the activities of the Motor Holding Division during the period that it owned stock in appellant were improper in some undefined manner is inconsistent with the position taken on the trial, as demonstrated by the vary record references cited (Tr. Vol. III, pp. 870-72).

The Trial Court observed that “supervision exercised either directly or indirectly” during the time when General Motors had contributed to the capital

³See also Defendant’s Exhibit A-27, admitted at Tr. Vol. IV, p. 1232, in which Mr. Anderson’s son suggests on January 25, 1952, that in view of the possible interest of the Internal Revenue Agent in Mr. Anderson’s absences from Seattle, that it would be a good idea to at least *come through* Seattle on his return from New York to Palm Springs.

was in "no measure the same relationship" that later existed after the contribution had been paid (Tr. Vol. III, p. 979).

Mr. Anderson testified that after Motor Holding was paid off they stepped out and he ran the business independent of General Motors.

"The Court: And thereafter you directed the affairs of Anderson Buick?

A. That is correct, yes, sir.

Q. *And you were the officer or you were the boss?*

A. *The boss, yes.*

The Court: *It was your venture?*

A. *Yes, sir.*" (Emphasis supplied)
(Tr. Vol. III, p 874)

Mr. Anderson further testified (Tr. Vol. III, p. 848):

"The Court: Did you dissolve this corporation as soon as you paid off—

A. As soon as we paid off Motors Holding, yes.

The Court: *And you ran it as a private business then?*

A. *Yes, your Honor.*"

5. Partners in Progress

Appellant's argument that the relationship between General Motors and its 18,000 dealers is one of partnership, as that term is used in the law, seems largely an exercise in semantics. The agreements each provided (Tr. Vol. I, p. 95):

"This Agreement of which these Terms and Conditions are a part does not constitute Dis-

tributor the agent or legal representative of Seller for any purpose whatsoever." (Art. 30).

The testimony of Mr. Anderson makes it very clear that, except for the periods 1936-1940 and 1942-1945 when the appellant operated with General Motors capital as a Motor Holding dealership, General Motors has never participated in appellant's profits, or its losses, owned any of its stock, or had representation on its Board of Directors or in its management. Appellant borrowed in excess of a million dollars in the conduct of its business affairs without notice or advice to General Motors.⁴ Appellant hired and fired its own employees, speculated in Washington and California real estate, engaged in the manufacture of kitchen appliances, highway flasher signals, toys, etc., utilizing the capital of Anderson Buick Company, without notice to or knowledge of General Motors. In a word, to quote Mr. Anderson (Tr. Vol. III, p. 874) he "was the boss"; the company was "his venture"; and he acted on his own independent judgment in conducting its affairs (Tr. Vol. III, p. 1154).

The evidence shows that the relationship created by the contracts between appellant and General Motors is completely inconsistent with any concept

⁴After Mr. Anderson had testified that he had borrowed large sums of money from a number of banks without notice to or review by anyone connected with General Motors (Tr. Vol. III, pp. 1153-54) the following colloquy occurred (p. 1154):

"The Court: You worked—you acted on your own independent judgment in making these loans?

A.—Yes.

The Court: Did you act on your own independent judgment in making all other bank loans?

A.—Generally, yes, your Honor."

Mr. Howard Anderson testified the making of these large loans wasn't "any concern" of Buick. (Tr. Vol. IV, p. 1413.)

of partnership, agency, trust or anything else but a purely independent contractual undertaking.

The main base of appellant's argument that a partnership existed nonetheless, seems to be the rhetorical expression "Partners in Progress" coined by Mr. Curtice, President of General Motors, and used for the first time in a speech at a dinner, given in Mr. Curtice's honor, in Chicago in 1954. Appellant seizes on this expression, and argues that the parties owed one another the fiduciary obligations inherent in a partnership arrangement. Mr. Curtice, in his deposition, repeatedly made it clear that he was not using the word "partner" as a legal word of art and that he was speaking as a businessman. (Dep. p. 204).

6. *Alleged dominant position of General Motors*

Appellant's argument under this rubric (Br. pp. 21-22) seems to be that General Motors owed appellant some special duty above and beyond the mutual duties and obligations of the contracts because it occupied a "subservient" position.

(a) In support of the contention, appellant first asserts that periodically General Motors "would herd its distributors together" and pass out the printed forms of agreement. This assertion is not supported by the record references cited (Tr. Vol. III, pp. 1087-88; Tr. Vol. V, pp. 1954-55; Curtice Dep. pp 276-77), and is flatly contradicted by Mr. Anderson's testimony.

Mr. Anderson testified (Tr. Vol. IV, p. 1179), in response to questions as to the procedure followed in contracting:

"Q. Do you recall how you received this contract for execution, Mr. Anderson?

- A. My best recollection would be in the mail. Sometimes we have meetings as I testified and sometimes through the mail."

Any inference that appellant executed the eighteen contracts between the parties as a result of "business compulsion" or because of misrepresentation or because of appellee's failure to disclose information has, of course, been completely refuted by the jury's explicit finding to the contrary (Tr. Vol. II, pp. 500-503).

(b) Appellant next refers to the fact that General Motors was larger and had more money than Anderson Buick Company. The relevance or materiality of the comparative size and wealth of appellant and appellee is not shown. Such argument would be out of order in a jury argument; it surely has no place in a United States Circuit Court of Appeals. Appellant's claim that the ending of the distributorship resulted in its financial ruin is, of course, groundless.⁵ (See *supra*, pp. 10-11).

(c) Appellant's final assertion that the fixed assets on Anderson Buick Company were one purpose buildings in which it would be impossible to operate any business except a Buick distributorship at a profit is specious. The facilities were not only usable for other lines of cars, as is witnessed by the fact that Mr. Anderson became the DeSoto-Plymouth distributor for Chrysler Corporation (Tr. Vol. III, p. 1075) and the Packard distributor for Packard Motor Car Co. (Tr. Vol. III, p. 1080), they were also

⁵The trial court noted: "That the plaintiff may have hoped for the continuance of renewals is immaterial; that his fondest hope was not fulfilled in the eighteen agreements which were made is questionable; * * * (Tr. Vol. VI, p. 2475.)

readily adaptable for other purposes (Bauer Dep. pp. 33-34; Tr. Vol. III, pp. 801-02).⁶

That the DeSoto-Plymouth operation was a suitable one for the buildings and promised substantial profits cannot be doubted but to quote Mr. Anderson "our timing was bad." (Tr. Vol. IV, p. 1319). According to Mr. Anderson, the DeSoto-Plymouth operation failed because of the shortcomings of the Chrysler Corporation, its products and its representatives. This is detailed in defendant's Exhibit A-40 (Tr. Vol. V, p. 1687) and there is not a single word that suggests that appellant felt that its inability to make profits was due to excessive fixed assets.⁷

As to the Packard franchise, Mr. Anderson testified that it was his opinion that the profit potential of the Packard distributorship, at the time he took it, was very good (Tr. Vol. III, p. 1081). The reason for his failure as a Packard distributor was not shown.

⁶Defendant's Exhibit A-50, which is based on the financial statements submitted to appellee, admitted without objection, (Tr. Vol. V., p. 1774) shows that appellant's *retail* operations for the three years 1950-52 produced a profit of \$859,763. His *wholesale* operation for the same period resulted in a *net loss* of \$5,622.

⁷Appellant's account of his experience as a Chrysler distributor, as related in Defendant's Exhibit A-40, presents an interesting parallel to his account in the present case of his experience as a Buick distributor. There, as here, Mr. Anderson attempted to create unilaterally a "partnership"; there, as here, he contended that he was the victim of fraudulent misrepresentations and non-disclosures; there, as here, he contended that the Chrysler Corporation failed to treat him fairly and failed to cooperate in respect of car distribution, personnel, inventories, etc.; and there, as here, Chrysler failed to understand and appreciate that its distribution system was, in Mr. Anderson's opinion, unsatisfactory.

7. *Buick's Alleged Policy and Anderson's Alleged Reliance on Long-Range Nature of Distributorship*

All of the assertions in appellant's brief (pp. 22-32), concerning action allegedly taken because of appellee's failure to notify it of a so-called policy, have been disposed of by the findings and verdict of the jury. The jury necessarily found, and on the evidence could not have found otherwise, that appellant took no action of *any* kind on *any* non-disclosure of the appellee in respect to *any* matter.

In support of its contention (Br. pp. 29-30) that Anderson relied on representations made by Nash at the November 9, 1951, meeting appellant cites *Anderson's own version of the meeting as a categorical fact*. Nash's version which conflicts in every material particular is skipped over lightly with the comment that "Nash's testimony of the 1951 meeting differs in some respects from that of Anderson." Thus appellant claims reliance upon representations that *the jury found were never made*.

In the trial court, appellant's counsel took a different position. After posing the two irreconcilable versions of the meeting, counsel for appellant told the jury it was for them "to resolve the conflict". (Tr. Vol. II, p. 511).

The jury, as noted by the trial court (Tr. Vol. II, p. 511), "answered these rhetorical questions of counsel by their verdict; they rejected the testimony of Anderson and accepted the testimony of Nash," and found as an independent fact (Ans. to Spec. Interrog. No. 1, Tr. Vol. II, p. 500) that Mr. Anderson's version of the meeting of November 9,

1951, which is set forth in appellant's brief (pp. 29-30) is untrue.

The contention in the brief (p. 31) that appellant acted in reliance on its belief that its distributorship contract would run indefinitely is contradicted by Anderson himself.

It is perfectly plain that appellant recognized that its relationship with Buick Division was a simple contractual one and that its rights and duties and appellee's rights and duties were those set forth in the contract. In a memorandum to Weston, the General Manager of appellant (Tr. Vol. IV, p. 1303; Def. Ex. A-33), Anderson stated:

"It should be made very clear that Anderson Buick Company has a contract that runs for only two years beginning October 15, 1945. This contract definitely terminates October 15, 1947, with no recourse for Anderson Buick Company other than such consideration as covered in the GM contract covering unexpired leases and leasehold improvements."

Mr. Anderson further testified (Tr. Vol. IV, p. 1305) with reference to the quoted statement: "there is nothing inaccurate about that statement."

In spite of this solemn judicial admission by the president of the appellant corporation, appellant's Brief asserts (p. 31) that Anderson invested substantial sums of money in reliance on his belief that notwithstanding the term of his contract he would be recontracted as a distributor indefinitely. The expenditures alleged to have been made in reliance on this belief were as follows:

- (a) The purchase of the Westlake Corporation stock by M. O. Anderson.

- (b) The acquisition of the Westlake stock by Anderson Buick Company.
- (c) Construction of Unit 3.
- (d) The \$500,000 mortgage loan.
- (e) Extensive advertising.

The evidence conclusively demonstrated that *none* of these expenditures was made as a result of any reliance on any non-disclosure and the jury so found.

- (a) *The purchase of the Westlake Corporation stock and its resale to Anderson Buick Company.*

M. O. Anderson purchased the stock of Westlake Corporation, owner of the premises leased by Anderson Buick Company, not because of any reliance as to tenure, but because it was a good investment. Mr. Anderson agreed to pay \$226,000 (Tr. Vol. III, p. 1109) for the outstanding stock; he made a down payment of \$35,000 of which \$18,000 was an advance from Anderson Buick Company (Tr. Vol. III, p. 1105). Rental payments by Anderson Buick Company were applied upon the purchase price (Pl. Ex. 63, (Tr. Vol. III, p. 986). After \$75,000 to \$85,000 of installment payments had thus been made for his personal account (Tr. Vol. III, p. 1110), Anderson Buick Company agreed to buy the stock from Mr. Anderson for \$350,000. It elected to pay the balance due for Westlake Building Company stock and made final payment to Mr. Anderson in 1950. Thus Mr. Anderson enjoyed a capital gain of \$125,000 on an investment of \$17,000.

- (b) *Construction of Unit 3*

The reason stated by Mr. Anderson for the con-

struction of Unit 3 was that "we were ambitious and needed more space and had to have more room for cars and parts and the market was expanding" (Tr. Vol. III, p. 1114).

That these were retail facilities there can be no doubt (Def. Ex. A-24, Tr. Vol. IV, pp. 1221-24, Tr. Vol. V, pp. 1733-40, Tr. Vol. III, pp. 1114-21).

(c) *The \$500,000 mortgage loan*

Whichever of Mr. Anderson's several accounts as to the reason for the \$500,000 loan is accepted, it is clear beyond the possibility of argument that the money was utilized in the retail rather than the distributor aspect of its business (see *supra*, pp. 22-24).

(d) *Expenditures for advertising*

Mr. Anderson's testimony on the trial that he would not have spent money advertising if he had known that his distributorship would not be renewed indefinitely and that his advertising related to his wholesale operation rather than his retail operation was so inherently incredible that it moved the Court to examine Mr. Anderson at length (Tr. Vol. V, pp. 1632-37). One example will suffice to show that the witness's testimony bordered on the ludicrous:

"The Court: You said that had you known Buick Division's policy as you allege with reference to the distributorship, that you would not have employed this man or these people in this advertising department in the year 1947?

A: No.

The Court: My question is: Is your answer the same if you consider the fact that

during that year you had a gross sale of \$4,450,000 in cars and parts and service?

A: Yes, it's the same, your Honor."

No comment seems necessary.

8. *Anderson Alleged Discovery That He Had Been Defrauded*

Appellant asserts (Br. p. 32) that appellant did not discover that it had been defrauded until October of 1953.

In two verified complaints, it was alleged that the fraud was first discovered on July 10, 1952, the date of the Portland meeting advising of the ending of the distributorship on June 30, 1953.

On June 19, 1957, over the objection of the defendant, Judge Bowen permitted plaintiff to amend the amended complaint in an attempt to meet defendant's affirmative defense of waiver. This third verified pleading alleged that the fraud was first discovered on October 21, 1953, a date considered safely past November 1, 1952, when plaintiff executed the last distributorship contract. (Tr. Vol. I, p. 365).

The intelligence which appellant contends gave it first knowledge that it had been defrauded is Plaintiff's Exhibit 81 which is a letter dated October 21, 1953, and sent to one Friedlander, a customer of Anderson Buick Company. Mr. Anderson testified that "*it was in October, 1953, when Mr. Paul Friedlander, a customer of ours, brought this letter to my office.*" (Tr. Vol. III, p. 1070).

Thus when Mr. Anderson verified the first two complaints which alleged that he *knew* that appel-

lant had been defrauded on July 10, 1952, he had before him the Friedlander letter of October 21, 1953 (Pl. Ex. 81, Tr. Vol. III, pp. 1070-73). How Mr. Anderson could *know* a fact occurred on July 10, 1952, with sufficient certainty to solemnly swear to it on July 5, 1955, and again on May 17, 1957, and then swear on June 19, 1957, that he did not know the same fact until October 21, 1953, was never explained to the jury. The Friedlander letter was admitted into evidence as testing Mr. Anderson's credibility (Tr. Vol. III, p. 1070), as indeed it did.

SUMMARY OF ARGUMENT

By its general verdict and answers to the interrogatories, the jury found that appellee had not been guilty of any fraud; that appellant was not justified in acting on the assumption that its distributorship would be continued indefinitely; that appellant did not, in fact, take any action in reliance upon, or suffer any damage as a result of, the alleged misrepresentations or non-disclosure; and that appellant did not enter into any of its highly profitable agreements with appellee because of any business compulsion or fraud. There was abundant evidence to support the findings.

The Trial Court could not have charged that the existence of a relationship of trust and confidence had been established as a matter of law. The evidence with respect to the nature of the relationship between the parties, like the evidence with respect to each of the other basic issues in the case, was in direct and irreconcilable conflict. Accordingly, the Court properly left it to the jury to determine, as a question of fact, "upon all the evidence exactly what that relationship was" and "if you are satisfied

that a relationship of trust and confidence did exist * * * whether in fact the overall policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence and should have been disclosed to Anderson Buick Company" (Tr. Vol. VI, p. 2400). There was abundant evidence to support the findings of the jury that the relationship between the parties was not, in fact, one of trust and confidence or such as to require disclosure of the alleged policy.

ARGUMENT

I.

BY ITS GENERAL VERDICT, AS WELL AS BY ITS ANSWERS TO THE INTERROGATORIES, THE JURY FOUND THAT APPELLANT HAD FAILED TO ESTABLISH THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION FOR FRAUD.

APPELLANT'S CONTENTION THAT THE JURY FOUND ALL ESSENTIAL ELEMENTS, EXCEPT A DUTY TO DISCLOSE, IS WITHOUT MERIT.

Appellant prefaces its argument concerning the alleged error in the Court's charge with a preliminary contention that is wholly unfounded. The preliminary contention (Br. pp. 45-51) is that the alleged error in the charge requires reversal of the judgment because, if there was a duty to disclose, the jury's answers to the interrogatories established each of the other elements necessary to establish appellant's claim of fraud. Accordingly, appellant contends, if there was a duty to disclose, "the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors" (Br. p. 51). The contention is baseless.

A. The law of Washington as to fraud.

The nine essential elements of a cause of action for fraud have been reiterated in case after case by the Supreme Court of Washington. *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 120-1, 34 P.2d 428, 430 (1934); *Peoples National Bank of Washington v. Brown*, 37 Wn. 2d 49, 60, 221 P.2d 530, 536 (1950); *Graff v. Geisel*, 39 Wn. 2d 131, 141, 234 P.2d 884, 889-90 (1951); *Puget Sound National Bank v. McMahon*, 153 Wash. Dec. 40, 42, 330 P.2d 559, 560 (1958):

“These are: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter’s reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.” *Webster v. Romano Engineering Corp., supra*.

Failure of proof of a single one of the nine essential elements wholly bars recovery in a fraud action. *Loehr v. Manning*, 44 Wn. 2d 908, 272 P.2d 133 (1954). In *Puget Sound National Bank v. A. J. McMahon, supra*, the Court again reiterated the settled rule:

“In an action for fraud, the burden is upon plaintiff to prove the existence of *all* the essential and necessary elements ‘that enter into its composition’ * * *. All of the ingredients must be found to exist. The absence of any one of them is fatal to a recovery.” (330 P.2d at p. 560-1).

The burden of proof upon the plaintiff is partic-

ularly heavy because, in Washington as in many jurisdictions, the presumption of innocence of fraud is as strong as "the presumption of innocence of crime." See *Dobbin v. Pacific Coast Coal Company*, 25 Wn. 2d 190, 202, 170 P.2d 642, 648 (1946):

" 'It follows from the rule that fraud will not be presumed that the burden of proving fraud rests on the party who relies on it either for the purpose of attack or defense.

" 'The rules which impose the burden of proof on one alleging fraud and which deny a presumption of fraud rest on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, *the presumption against fraud approximating in strength the presumption of innocence of crime.*' (Italics ours.)"

Whether the claim for fraud is based upon a statement of fact, shown to be untrue, or a failure to speak where there is a duty to speak, proof of an actual intent to deceive and defraud is of the very essence of the cause of action. As stated by the Court in *Brown v. Underwriters at Lloyds*, 153 Wash. Dec. 126, 130, 332 P.2d 228, 231 (1958):

"Over a hundred years ago, the supreme court of North Carolina in *Tilghman v. West*, 43 N. C. 183, 184, declared:

"* * * Fraud cannot exist, as a matter of fact, where the intent to deceive does not exist; for it is emphatically the action of the mind which gives it existence. * * *"

In *Lincoln v. Keene*, 51 Wn. 2d 171, 173-4, 316 P. 2d 899, 901 (1957), the Court said:

“The applicable general rules with reference to fraud by concealment are: * * *

“(3) If the circumstances surrounding the contract impose a duty upon one of the parties to disclose all material facts known to him and not known to the other, want of disclosure *with intent to deceive* will amount to fraud.” (Emphasis supplied).

B. The Jury's Verdict

Appellant's contention that, if there was a duty to disclose, the jury's answers to the interrogatories established an intent to deceive and each of the other elements necessary to establish its claim of fraud is so demonstrably without basis that it is difficult to believe it is seriously advanced.

The two answers upon which appellant relies are each to be read in the light of the jury's general verdict, which resolved all issues of fact in favor of appellee, and in the light of the jury's further specific findings. The further specific findings were that appellee *did not* “during the period 1937-1941 formulate and adopt a policy which in substance provided for the termination of the distributorship of Anderson Buick Company” and that appellee *did not* “continuously have such a policy for the period from 1941 to July 10, 1952” (Tr. Vol. II, p. 501). These basic findings were not only supported but were compelled by the evidence.

The two findings invoked by appellant are (1) the finding that, on November 9, 1951, appellee had a policy which, in substance, provided for the termination of appellant's distributorship and (2) the

finding that appellant did not know and was not chargeable with knowledge thereof. The jury made no other findings on which appellant could or does attempt to rely. Even assuming, contrary to the fact, that the jury had found the relationship between the parties to have been "a confidential relationship" and that such a policy "fell within the orbit of the relationship of trust and confidence" (Tr. Vol. VI, p. 2400) so as to require appellee to notify appellant thereof, these findings would still be wholly insufficient to establish a cause of action for fraud.

The jury would still have to find (1) that appellee's failure to notify appellant of its alleged policy was due to an intention to deceive and defraud appellant, (2) that, despite the express provisions of the written agreements between the parties, appellant had the right to rely upon the assumption that its distributorship would be indefinitely continued and (3) that appellant had in fact acted in reliance upon such assumption and suffered damages as a result of any action so taken.

Far from so finding, the jury found exactly the opposite by its general verdict in favor of appellee, as well as by its answers to the interrogatories. There was substantial evidence to support a finding by the jury in favor of appellee on each of the issues which the Court submitted to the jury in its charge. In *Traders & General Ins. Co. v. Powell*, 177 F. 2d 660, 663 (8 Cir. 1949), the Court said:

"The sole question for our determination on this issue is, therefore, whether there is any substantial evidence to support the verdict of the jury for the appellee. In considering this question we assume as established all the facts

that appellee's evidence reasonably tends to prove, and there must be drawn in her favor all the inferences fairly deductible from such facts. *Lumbra v. United States*, 290 U.S. 551, 552, 54 S.Ct. 272, 78 L.Ed. 492; *Sears, Roebuck & Co. v. Scroggins*, 8 Cir., 140 F.2d 718, 723; *F. H. Peavey & Co. v. First National Bank of Dickinson*, 8 Cir., 140 F.2d 815. Problems presented by conflicting evidence or depending upon credibility of witnesses and weight of the evidence are to be decided by the jury and not by this or the trial court. *Walkup v. Bardsley*, 8 Cir., 111 F.2d 789; *Lynch v. United States*, 2 Cir., 162 F.2d 987."

1. In its charge, the Court expressly left it to the jury to determine whether there was any intention on the part of appellee to deceive and defraud appellant, either by the statements attributed to Mr. Nash or by appellee's failure to notify appellant of its alleged policy (Tr. Vol. VI, pp. 2408, 2425). By its general verdict for appellee, the jury found that there was no such intention.

2. In its charge, after summarizing the provisions of the written agreements between the parties (Tr. Vol. VI, pp. 2413-16), the Court expressly left it to the jury to determine,

"whether the Anderson Buick Company received such notice from their contents as to make it unreasonable for that company, exercising ordinary business prudence, to rely upon any statement (2667) which might have been made to plaintiff concerning the policy of General Motors, particularly with reference to a continuance of the distributorship beyond the one-year term for which they provided; and also whether Anderson Buick Company by these annual agreements was put on notice that the term of its distributorship was limited to a

period of one year and that further renewal might thereafter be denied plaintiff by General Motors and that there was then no present policy of General Motors which operated to grant to Anderson Buick Company a distributorship for any period beyond the one year provided."

By its general verdict for appellee, the jury found that appellant did receive such notice from the written agreements.

3. In its charge, the Court expressly left it to the jury to determine whether appellant had acted in reliance upon, and suffered any damages as a result of, the alleged misrepresentations or non-disclosure (Tr. VI, pp. 2409-10, 2418-19, 2422, 2425-26). By its general verdict for appellee, which was supplemented by its specific finding in answer to Interrogatory No. 9(a) (Tr. Vol. II, p. 502), the jury found that appellant had not acted in reliance upon, or suffered damages as a result of, the alleged misrepresentations or non-disclosure.

4. Finally, the Court, without objection or exception by appellant, charged that (Tr. Vol. VI, p. 2417)

"these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure,"

unless the jury found that appellant, as it claimed, had been caused to enter into the agreements by "business compulsion" or fraud on the part of appellee. Both by its general verdict and by its answers to Interrogatory No. 10 (Tr. Vol. II, pp. 502-03) the jury found that appellant had not been caused to

enter into the written agreements either by "business compulsion" or by fraud.

Appellant's contention (a) that appellee had fraudulently sought to induce appellant to believe that its distributorship would be continued indefinitely, (b) that appellant was justified in relying upon such belief, and (c) that appellant had, in fact, acted in reliance on such a belief was in complete and irreconcilable conflict with the express provisions of the written agreements between the parties. Each of the earlier annual agreements contained ninety-day cancellation clauses and each of the agreements entered into after 1947 limited the term of the distributorship to one year (Tr. Vol. VI, p. 2389) and expressly provided (Tr. Vol. I, p. 54):

"At the end of the stipulated term, this Agreement shall automatically terminate without notice or action on the part of either party unless sooner terminated as hereinafter provided in Section 26."

The final article of the agreements, entitled "*Sole Agreement of the Parties*", specifically stated (Tr. Vol I, pp. 97-98):

"No change in, addition to, or erasure of any printed portion of this Agreement (except the filling in of blank lines) shall be valid or binding upon Seller unless the same is approved in writing by the General Manager or General Sales Manager of Seller.

* * *

"There are no other agreements or understandings, either oral or in writing, between the parties affecting this Agreement or relating to the sale or servicing of Buick motor vehicles, chassis, parts or accessories.

"This Agreement cancels and supersedes all previous agreements between the parties."

Appellant's contention that it suffered substantial losses as a result of appellee's failure to notify it that its distributorship would not be continued indefinitely was in complete and irreconcilable conflict with (a) the fact that Mr. Anderson personally realized the sum of \$2,642,131 during the sixteen-year period on the basis of an original investment of \$7,500; (b) the fact that the corporate net worth increased from \$75,657 on December 31, 1936 (of which amount appellee had contributed all but \$7,500) to a corporate net worth of \$1,248,037 on June 30, 1953 when appellant elected not to continue its relationship with appellee on a dealership basis, and (c) the fact that, regardless of which of appellant's varying versions of the purpose of its \$500,000 loan in November, 1951 be accepted, not a single penny of the amount was used for the acquisition of wholesale facilities (see pp. 22-24, *supra*).

There is, in short, no possible basis for appellant's bald assertion (Br. p. 51) that "if there was a duty to disclose as a matter of law, the jury's general verdict necessarily would have been in favor of Anderson rather than of General Motors."

II.

THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT APPELLEE WAS LEGALLY OBLIGATED TO NOTIFY APPELLANT OF ITS ALLEGED POLICY.

APPELLANT'S SPECIFICATION OF ERROR NO. I IS WITHOUT MERIT.

A. The Trial Court's Answer to Specification of Error No. I

The Trial Court, when denying appellant's motion

for a new trial, discussed at length the lack of basis for Specification of Error No. I (161 F. Supp. 668, 672, 674, Tr. Vol. II, pp. 511-12, 516-18). The Court's conclusion that Specification of Error No. I is groundless is amply supported by the record.

B. The Court's Charge

The Court's charge clearly presented to the jury the basic factual issue raised by the conflicting claims and evidence of the parties. The Court first described the nature of appellant's claim of fraud by non-disclosure and then summarized briefly the basic uncontroverted facts with respect to the overall relationship between the parties (Tr. Vol. VI, pp. 2397-98):

"There was a commercial and business relationship between the plaintiffs and General Motors. Plaintiff was in this locality as the marketing outlet of the Buick; each party had a real business interest in each other's operations.

"The Anderson Corporation functioned as a business enterprise controlled by its own stockholders and officers, and General Motors did not share in its profits, save during the early years when Motors Holding was a stockholder."

The Court then stated appellee's contention with respect to the nature of the relationship between the parties (Tr. Vol. VI, pp. 2398-99):

"It is the contention of General Motors that its interest in the activities of the Anderson Corporation as one of its distributors and dealers was upon a strictly business basis as was outlined and provided for by the written agreements which were in the main annually made, that such supervision as it exercised was to see

that these agreements were observed and performed, that the actual operation of the distributorship and dealership was left to the judgment and ultimate decision not of General Motors but of Anderson Buick Company and that while the relationship was of a friendly nature it was entirely a relationship of two separate business enterprises where General Motors did not occupy a superiority or wield an influence over the distributor or dealer by reason of a confidence and trust imposed in it. (2645).

"It is also contended by General Motors that it set up minimum working capital requirements only to insure profitable and efficient operation and to assure that the facilities, management and resources of its Distributors and Dealers were adequate to expand the market for the Buick automobile, to service the cars sold and to create and preserve good will for the Buick product and that this was its prerogative under its written agreement."

The Court then charged the jury with respect to the applicable law where a confidential relationship is found to exist and what facts must be found before a confidential relationship is established (Tr. Vol. VI, pp. 2399-2400) :

"The law says that where a confidential relationship exists that there arises a duty of loyalty and fair dealing which includes a duty of full disclosure of all matters directly bearing upon the subject matter of their dealings, particularly where the matter lies peculiarly within the knowledge of one party and the other has no reasonably available means of access to that knowledge.

"You will be mindful, however, that to establish a relationship of trust and confidence

upon the violation of which fraud may be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. There must be something which impels or induces the trusting party to relax the care and vigilance which he otherwise should and ordinarily would, exercise and there (2646) must be a continuing dependence.

"It is the contention of the plaintiff that a relationship of trust and confidence existed. It is for you to decide upon all the evidence exactly what that relationship was. In law, a relationship of trust and confidence extends to all matters as to which confidence is reposed and in which superiority and influence resulting from such confidence may be exercised by one person over another. The impulse of man to trust one in whom he has reposed his confidence is not ignored by the law. If you are satisfied that a relationship of trust and confidence did exist between the parties to this suit, you must then inquire whether in fact the overall policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence, and should have been disclosed to Anderson Buick Company by General Motors in good conscience and fair dealing as that is measured in the thinking of honest and honorable men in the light of their relationship.

"The suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation, that such fact does (2647) not exist. You must, however, first be satisfied that such an obligation to speak on the matter is present by reason of a duty arising from the relationship of the parties."

Appellant made no objection and took no exception to any of the above quoted portions of the charge.

C. Appellant's Requested Instruction

The instruction requested by appellant consisted of two sentences and covered two separate points: (1) the nature of the relationship between the parties and (2) the scope of the duty of disclosure required by the alleged relationship (Tr. Vol. II, p. 415):

"[1] You are instructed that the relationship between the defendant General Motors Corporation as manufacturer and the plaintiff Anderson Buick Company as its distributor was a relationship that gave rise to a duty of mutual trust, confidence and loyalty in their mutual business dealings with respect to the subject matter thereof.

"[2] Such a duty includes the duty of General Motors Corporation to disclose to Anderson Buick Company any material matter respecting the subject matter of their business dealings that was peculiarly within the knowledge of the defendant and as to which the plaintiff was ignorant."

The Court could not and did not give appellant's proposed charge with respect to the nature of the relationship between the parties because, as stated by the Court (Tr. Vol. II, p. 518),

"The evidence presented a sharp conflict as to the manner in which plaintiff corporation and defendant operated in their dealings. This conflict also extended to the matters on which plaintiff claimed it sought or received help, assistance, advice or guidance from the defendant."

Accordingly, the Court left this disputed question of fact to the jury (Tr. Vol. VI, p. 2400):

"It is the contention of the plaintiff that a relationship of trust and confidence existed. It is for you to decide upon all the evidence exactly what that relationship was."

The Court could and did give, in language substantially identical with that proposed by appellant, the second portion of appellant's proposed instruction relating to the scope of the duty of disclosure required by a relationship of "trust and confidence." In this connection the Court charged (Tr. Vol. VI, p. 2399) :

"The law says that where a confidential relationship exists that there arises a duty of loyalty and fair dealing which includes a duty of full disclosure of all matters directly bearing upon the subject matter of their dealings, particularly where the matter lies peculiarly within the knowledge of one party and the other has no reasonably available means of access to that knowledge."

The Court further charged (Tr. Vol. VI, p. 2400) :

"If you are satisfied that a relationship of trust and confidence did exist between the parties to this suit, you must then inquire whether in fact the over-all policy of General Motors with reference to continuance of the existing distributorship was of such a nature as fell within the orbit of the relationship of trust and confidence, and should have been disclosed to Anderson Buick Company * * *."

Appellant made no objection and took no exception to this basic portion of the Court's charge. Appellant thus conceded that, even if a relationship of "trust and confidence" was found to exist, the further question of whether the asserted policy fell within the area where trust and confidence was reposed was a question of fact for the jury.

Appellant's basic contention on this appeal, as stated in Specification of Error No. I (Br. p. 45) and argued at pages 45-81 thereof, is that

"The Court erred in failing to instruct the jury that General Motors owed Anderson, as a matter of law, a duty to disclose its *distributorship termination policy*." (Emphasis supplied).

This basic contention and appellant's entire argument in connection therewith is based upon a false assumption. It assumes that appellant requested the Court to instruct the jury that appellee was obligated, as a matter of law, to disclose its alleged "distributorship termination policy." However, as pointed out above, appellant did not, in fact, make any such request. On the contrary, both by failing to request such an instruction and by its acquiescence in the instruction given by the Court, appellant conceded that, even if a relationship of trust and confidence was found to exist, the question of whether the alleged distributorship termination policy "was of such a nature as fell within the orbit of the relationship of trust and confidence and should have been disclosed" was a question of fact for the jury.

It is not open to appellant now to assert that the Court erred in failing to give an instruction never requested—i.e., that appellee was required, as a matter of law, affirmatively to notify appellant of its alleged "distributorship termination policy." Rule 51 of the Federal Rules of Civil Procedure expressly provides:

"* * * No party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects and the grounds of his objection."

Accordingly, on this appeal, the only point properly raised by appellant's Specification of Error No. I is the claim that the Court erred in refusing to charge that a relationship of "trust and confidence" had been established as a matter of law.

D. Appellant's Argument

The Contention That the Court Should Resolve the Factual Issues

Appellant advances the proposition (Br. pp. 54-57) that the question of whether a duty to disclose exists "should be determined by the Court as a matter of law." Appellant's statement of the proposition, as well as its further contention that it is for the Court to determine the nature of "the relationship existing between the parties," begs the question. It assumes (a) that the ultimate facts with respect to the nature of the relationship are wholly uncontroverted and (b) that no conflicting inferences can be drawn from the uncontroverted facts. In the instant case there is no possible basis for a contention that the facts with respect to the nature of the relationship were uncontroverted, much less for a contention that the only inferences which could be drawn from the facts were that a "confidential relationship" existed.

If appellant is actually contending, as it appears to be, that in a fraud case the Court should take over the function of the jury and (a) first determine the actual nature of the relationship by itself resolving the controverted facts and the inferences to be drawn from any uncontroverted facts and (b) then

determine whether the facts found by the Court created a duty to disclose, appellant is proposing a complete abandonment of the concept of the respective functions of a Court and jury, as it exists in our system of jurisprudence.

The only authority cited in support of appellant's contention is a quotation of the last paragraph of an article published in 1936 in the Texas Law Review. The article, devoted largely to analysis of vendor-vendee cases, proposed the adoption of a new theoretical standard to determine whether liability should be imposed for non-disclosure. The standard proposed was "the standard man" and "what the man of ordinary moral sensibilities would have done." The paragraph quoted by appellant proposed that "the standard devised in this paper" should be applied by the Court, rather than the jury, because the Court has "the benefit of all the experience of his predecessors." As far as can be ascertained, neither the proposed new "standard" nor its proposed method of application has yet been adopted by any court.

Not only does appellant cite no cases in support of its contention that, in an action for fraud, the existence of an alleged "confidential relationship" should be determined, as a matter of law, by the Court, but the very cases cited in appellant's brief expressly recognize that this is a question of fact. Thus, in *Selle v. Wrigley*, 233 Mo. App. 43, 116 S.W. 2d 217 (1938), cited on pages 58, 59, 75 and 76 of appellant's brief, the court stated (116 S.W.2d. 217, 221):

"A confidential relationship may be said to exist where two persons stand in such a relation as that, while it continues, confidence is

necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other. * * * 'The only question is, does such a relation in fact exist.'

* * *

" 'It is in each case a question of fact. The law regards the real rather than the nominal, condition.'

* * *

"The question in such case is always whether or not trust is reposed."

The fact that the existence of a "confidential relationship" is a question of fact and, as such, to be determined by the jury is universally recognized.

"It is for the jury to determine whether a confidential relation existed between the person making the representation and the one to whom it was made . . ." 37 C. J. S. Fraud § 124.

"Likewise to be determined as issues of fact are the questions whether a party charged in a civil action with fraud concealed facts and whether under the circumstances it was his duty to disclose more than he did disclose or not to have said what he did say. A conflict in the evidence concerning the termination of a confidential relationship is to be determined by the jury." 24 Am. Jur. Fraud § 292.

" 'Whether a duty to speak exists in a given case is a question depending upon the peculiar facts involved, such as the nature of the transaction, the mutual relation of the parties, and their respective knowledge and means of knowledge.' " *Kelley v. Von Herberg*, 184 Wash. 165, 174-75, 50 P.2d 23, 27 (1935).

Where a party's right to rely on a false statement is predicated on a confidential relationship between the parties, the existence of the relationship is a

question of fact for the jury. *Burke v. Mayer*, 105 Wash. 1, 6, 177 Pac. 662, 663 (1919).

As recently as April 6, 1959, the Supreme Court of the United States had occasion to pass upon the relative functions of court and jury in determining the actual nature of an asserted relationship. *Baker v. Eexas & Pacific R. Co.*, U.S., 3 L.ed.2d 756, 758 (1959). In an action brought under the Federal Employers' Liability Act to recover damages for the death of petitioner's decedent, the petitioner asserted and the respondent railroad denied the existence of an employer-employee relationship. The trial court declined to submit the issue to the jury, holding as a matter of law that the asserted relationship did not exist. The Court held that this was error and said:

"Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. * * * 'The very essence of . . . (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "

Appellant's Basic Contention

Appellant reaches its basic contention upon this appeal at page 57 of its brief, where it asserts that "The relationship in the instant case between Anderson and General Motors was such that there was a duty to disclose as a matter of law." The argument in support of the assertion appears at pages 57-81 of its brief.

Reduced to its essence, the argument may be stated in the form of a syllogism, with the major premise, the minor premise and the conclusion all quoted from pages 57-58 of appellant's brief:

Major: "A duty to disclose exists between parties occupying a confidential relationship."

Minor: "General Motors occupied a confidential relationship to Anderson."

Conclusion: "There was a duty to disclose as a matter of law."

Appellant's Major Premise

Appellant's major premise consists of the broad generalization that "a duty to disclose exists between parties occupying a confidential relationship." Implicit in the generalization is the necessity of first determining (a) whether a "confidential relationship" did, in fact, exist between the parties involved and (b) whether the particular matter in question did, in fact, lie within the area of any "trust and confidence" which were actually reposed.

Appellant first cites a miscellaneous group of five cases as illustrating the breadth of the concept of a fiduciary or confidential relationship. *Stieber v. Vanderlip*, 136 Neb. 862, 287 N.W. 773 (1939); *Wilson v. Rentie*, 124 Okla. 37, 254 Pac. 64 (1926); *Voellmeck v. Harding*, 166 Wash. 93, 6 P.2d 373 (1931); *Klika v. Albert Wenzlick Real Estate Co.*, 150 S.W. 2d 18 (1941); *Selle v. Wrigley*, 233 Mo. App. 43, 116 S.W. 2d 217 (1938).

None of these cases involved the question of whether the Court should have charged the jury that a "confidential relationship" had been established as a matter of law. The *Stieber* and *Wilson* cases were suits in equity. The *Selle* case involved

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the sufficiency of a pleading. In the *Voellmeck* and *Klika* cases, jury verdicts in favor of the plaintiffs were sustained.

The relationship between the parties to the instant case was not remotely comparable to the relations involved in any of the five cases cited. They involved relationships between an incapacitated eighty year old woman and her daughter and legal advisors (*Stieber*); an illiterate elderly negro couple and their trusted business and legal advisor (*Wilson*); a dominant corporate executive and an employee to whom he had been "benefactor, counselor, master and friend" (*Voellmeck*); an inexperienced woman and a real estate company which purported to act as her confidential advisor (*Klika*); and an orphan boy and a farmer who induced him to work for nothing by a false pretense of legal adoption (*Selle*).

Appellant next cites and quotes from a group of nine cases in support of the general proposition that "a principal and agent have a duty to each other to make a full disclosure as to all matters material to the agency" (Br. pp. 61-68). None of these cases has any bearing upon the issues here presented because the relationship between the parties to the instant case was not that of principal and agent. (See *supra*, pp. 27-29).

None of the nine cases has any bearing on the single issue raised by appellant's Specification of Error No. I, i.e. whether the Court erred in refusing to charge that the relationship between the parties "gave rise to a duty of mutual trust, confidence and loyalty." None has any bearing on the question of whether the relationship between the

parties was in fact, one of "trust and confidence," and, if so, whether appellee's alleged policy did, in fact, lie within the area of any trust and confidence actually reposed.

Four of the nine cases cited (Br. pp. 61-63) deal with fraudulent representations made by or to real estate agents in the course of dealings with their principals. *Kruse v. Miller*, 143 Cal. App. 2d 656, 300 P.2d 855 (1956); *Walter v. Libby*, 72 Cal. App. 2d 138, 164 P. 2d 21 (1945); *McLeod v. Gaither*, 94 Fla. 55, 113 So. 687 (1927); *Louis Schlesinger Co. v. Wilson*, 22 N. J. 576, 127 A. 2d 13 (1956).

The other five cases cited (Br. pp. 63-68) are equally inapplicable. Three cases are cited in support of the assertion that "the relationship of a manufacturer to a distributor includes that of principal and agent." *Champion Spark Plug Co. v. Automobile Sundries Co.*, 273 Fed. 74 (C.C.A. 2, 1921); *Pugh v. A. D. Bothne Co.*, 178 Ia. 601, 159 N.W. 1030 (1916); *Twohig v. Lawrence Warehouse Company*, 118 Fed. Supp. 322, 224 F. 2d 493 (C.C.A. 8, 1955).

Whether the relationship between a manufacturer and a distributor does or does not include that of principal and agent, depends entirely upon the nature of the contract and of the facts involved in each particular case. In the *Champion Spark Plug* case the contract between the parties expressly constituted the plaintiff the "sales agent" of the defendant. The sole question involved in the *Pugh* case was whether a local automobile dealer and his place of business constituted an "agency" of the defendant manufacturer within the meaning of an Iowa service-of-process statute, so that jurisdiction over

the manufacturer could be acquired by service upon the dealer. No question of "confidential relationship" or "duty of disclosure" was either involved or considered. The *Twohig* case (erroneously cited as *John v. Baltimore and O. R. Co.*) did not involve a distributor at all but a purchasing agent who was defrauded by collusion between his insolvent principal and the defendant warehouse company.

Two cases are cited (Br. pp. 66-68) in support of the assertion that, "regardless how the distributorship relationship is classified", a manufacturer and a distributor have "an obligation to deal with the other in good faith." *Smyth Sales, Inc. v. Petroleum Heat & Power Co.*, 128 F. 2d 697 (C.C.A. 3, 1942); *E. H. Taylor, Jr. & Sons v. Julius Levin Co.*, 274 Fed. 275 (C.C.A. 6, 1921). The generalization is, of course, so broad that it is without specific meaning. It is difficult to think of any relationship where the parties are not required to deal in "good faith." Even the simplest contract requires the parties to comply in good faith with their contractual obligations. In the two cases cited, the defendants were guilty of flagrant and fraudulent breaches of their contractual obligations.

Appellant's Minor Premise

At pages 68-81 of its brief, appellant finally addresses itself to the problem of attempting to establish its minor premise, i.e. that the existence of a "confidential relationship" between the parties to this action was established as a matter of law by the uncontroverted evidence. The attempt takes two forms: 1. The citation of and quotation from another series of cases which have no bearing upon

the question of whether the appellant in the instant case did, in fact, repose its "trust and confidence" in appellee and whether appellee's alleged policy did, in fact, fall within the area of any such trust and confidence. 2. A repetition of various factual contentions made by appellant, which were contradicted by the evidence and rejected by the jury.

1. *The "Partnership" Contention*

Appellant first argues that a confidential or fiduciary relationship existed between the parties because they were "partners in progress," that such a relationship "is closely akin to a partnership in law" and that "the law applying is, of course, well settled." (Br. p. 70). None of the four cases cited has any relevance to the instant case where the relationship between the parties was neither a partnership nor "closely akin to a partnership." (See *supra*, pp. 9-10, 27-29).

2. *The "Domination and Control" Contention*

Plaintiff next argues that a fiduciary or confidential relationship existed between the parties because "General Motors completely dominated and controlled Anderson" (Br. p. 71). The argument consists of (a) quotations from two cases, (b) a reference to Appendix A to appellant's brief and (c) a reference back to plaintiff's distorted "Statement of the Case."

(a) Appellant's citation of and quotation from *United States v. General Motors Corp.* 121 F. 2d 376 (C.C.A. 7, 1941) manifestly have no bearing upon the claim that appellant was "completely dominated and controlled" by appellee. Appellant here

makes no contention that it was ever requested, much less required, to handle its car financing through General Motors Acceptance Corporation. Equally unavailing is appellant's attempt to cast itself in the role of the orphan boy who was defrauded by the farmer in *Selle v. Wrigley*, already commented on at pages 54-55, *supra*.

(b) Appellant's attempt to support its essential contention that the uncontroverted evidence in the instant case established, as a matter of law, the existence of a "confidential relationship" between the parties hereto by referring to the material set forth in the Appendix to its brief is utterly without justification. The reports quoted are not evidence in this case. They would not have been admissible if appellant had attempted to introduce them upon the trial. Appellant characterizes the entire eight-page Appendix as "Congressional Findings." The first four pages are excerpts from a Committee report. The entire balance of the Appendix does not contain any statement by any member of Congress and consists of a series of excerpts from a so-called "Staff Report" made by employees of a Subcommittee and was never adopted by the Subcommittee which employed them.

(c) Plaintiff's purported summary of the "uncontroverted evidence" claimed to have established, as a matter of law, the existence of "complete domination and control" and a relationship of "trust and confidence" (Br. pp. 73-77) is simply a repetition of the distorted version of the facts contained in appellant's purported "Statement of the Case." The baseless character of these contentions has already been discussed at length. (See *supra*, pp. 14-38).

3. The "Superior Knowledge" Contention

Appellant next cites a group of four cases in support of the contention that, even in the absence of a "confidential relationship," appellee was obligated to notify appellant of its alleged policy because of its "superior knowledge." (Br. p. 77). *Villalon v. Bowen*, 70 Nev. 456, 273 P.2d 409 (1954); *Kuhn v. Gottfried*, 103 Cal. App. 2d 80, 229 P.2d 137 (1951); *Everett v. Gilliland*, 47 N. M. 269, 141 P.2d 326 (1943); *Oates v. Taylor*, 31 Wn.2d 898, 199 P.2d 924 (1948).

Even if appellant had requested the Court to so instruct the jury, which it did not, no support for such a request is to be found in any of the four cases cited by appellant. In none of these cases were the facts involved remotely comparable in the instant case.

The *Villalon* case involved a woman who fraudulently represented herself to be the widow of a decedent and concealed the fact of a prior undissolved marriage at the time of her purported marriage to the decedent. She gained possession of the assets of the estate by having decedent's will (which left his estate to another) set aside on the ground that it had been executed prior to her purported marriage to decedent and accordingly had been revoked by operation of law. When the fraud was discovered by the special administrator of the decedent's estate, he sued and recovered the assets of the estate.

In the *Kuhn* case the defendant doctor, in connection with the sale of a medical practice, made false and fraudulent representations concerning the com-

pleteness of his medical records, the value of his equipment and the nature of his medical practice and concealed the existence of pending litigation with another doctor over a prior sale of the same practice. The buyer brought suit to cancel the note which he had given in payment for the practice and the relief sought was granted.

In the *Everett* case the seller of mortgaged realty, after undertaking to advise the buyer of all the facts concerning the mortgage indebtedness, fraudulently concealed the fact that interest was owing to the mortgagee and tendered the buyer a deed which falsely stated the amount due under the mortgage. The buyer recovered his damages in an action based upon the fraud.

In the *Oates* case the defendant superintendent of a building corporation failed to advise the plaintiff of the precarious financial condition of the corporation at the time the superintendent sought and obtained from the plaintiff an advance payment on the building contract for a house which the corporation was building for him. It was held that the superintendent was *not* guilty of any fraud because there was no fiduciary relationship between the parties and they were dealing at arm's length.

4. *The "Representations and Promises" Contention*

Appellant next cites three cases in support of the proposition (Br. p. 79-80) that appellee was obligated to notify appellant of its alleged policy because of alleged "promises and representations." *Ikeda v. Curtis*, 43 Wn.2d 449, 261 P.2d 684 (1953);

Kuhn v. Gottfried, *supra*, p 63; and *Everett v. Gilliland*, *supra*, p. 63.

The *Ikeda* case furnishes no more support for appellant's contention than do the *Kuhn* and *Everett* cases which have already been discussed (*supra* pp. 63-64). In the *Ikeda* case the plaintiff, an untutored Japanese, contracted to buy the good will, furniture and lease of what appeared to be a lucrative and legitimate small hotel business but was actually a house of prostitution. The seller's agent falsely represented that the "hotel" had a substantial number of permanent guests and the seller herself induced the buyer to purchase the business by affirmatively stating that the monthly income was from \$1,900 to \$2,300 and fraudulently concealing the fact that the large income resulted from her operation of the property as a bawdy house. The buyer recovered his damages in an action for fraud.

5. *The "Other Factors" Contention*

Under the caption "other factors" (Br. p. 81), appellant merely repeats the contention that, in reliance upon wrongful non-disclosure of appellee's alleged distributorship termination policy, it invested substantial sums in distributorship facilities, borrowed \$500,000 to obtain "working capital" and suffered "economic ruin" — contentions that are without basis in fact (See *supra*, pp. 10-11) and were rejected by the jury.

Appellant has failed to cite a single case which furnishes the slightest support for its contention that, despite the basic conflict between appellant's contentions and the oral testimony and documen-

tary evidence presented by appellee, the Trial Court should have usurped the function of the jury and held that the existence of a confidential relationship had been established as a matter of law. Appellant's Specification of Error No. I is wholly baseless.

III

SINCE THE JURY FOUND THAT APPELLANT'S EXECUTION OF THE WRITTEN AGREEMENTS WAS NOT INDUCED BY FRAUD OR BUSINESS COMPULSION, THEY CONSTITUTE A COMPLETE BAR TO THIS ACTION, AS CHARGED BY THE COURT WITH THE APPROVAL OF APPELLANT.

Appellant asserts (Br. pp. 84-87) that "the written dealership contracts do not preclude recovery by Anderson on a fraud theory." In support of the assertion appellant cites seven cases illustrating the rule that where a party has, in fact, been induced to enter into a contract by means of fraudulent representations, proof of the fraud is not barred by the provisions of the contract, either in an action for rescission or for damages. None of the cases is here relevant because in the instant case the jury found that appellant was not, in fact, induced to enter into any of its agreements by fraud.

There is not and cannot be any genuine issue on this appeal concerning the proposition that, in the absence of any fraud in the inducement, the written agreements between the parties constitute an absolute bar to appellant's asserted cause of action for fraud. As hereinafter pointed out, the Court so charged without objection or exception by appellant and the jury found that there was, in fact, no fraud in the inducement.

From the very inception of this litigation, appellant recognized the impossibility of recovery on the theory of justifiable reliance upon alleged misrepresentations or non-disclosure unless some way could be found to avoid the express provisions and legal effect of the written agreements into which it had entered during the years 1936 to 1952, inclusive. Appellant's recognition of the fact that it could not take any action in reliance upon the assumption that its distributorship agreement would be continued indefinitely or that any new distributorship agreement would be offered after the expiration of the current agreement appears with crystal clarity from a memorandum written by Mr. Anderson himself on January 22, 1947, which stated: (Def. Ex. A-33; Tr. Vol. IV, pp. 1303-04).

"It should be made very clear that Anderson Buick Company has a contract that runs for only two years beginning October 15, 1945. This contract definitely terminates October 15, 1947 with no recourse for Anderson Buick Company other than such consideration as covered in the GM contract covering unexpired leases and leasehold improvements. It would seem that we are well within our rights to protect ourselves because of the type of contract that we have."

Appellant sought to avoid the bar of the written agreements by contending that the provisions of the agreements were not binding upon it for two reasons: (1) because all of the agreements entered into after 1936 had been entered into "involuntarily" and as a result of "business compulsion"; and (2) because appellant had been induced to enter into all of the agreements by fraud on the part of appellee.

The claim that its highly profitable agreements had never been binding upon appellant because it had been forced to enter into them by business compulsion was advanced in each of the three successive complaints (Tr. Vol. I, pp. 9, 307; Vol. II, p. 402). The claim that appellant had been induced to enter each of the agreements by fraud was first advanced after the close of the case and while the Court, in consultation with counsel, was formulating its instructions to the jury. At appellant's request, and over appellee's objections (Tr. Vol. VI, pp. 2251-53), the Court agreed to submit to the jury not only the original claim of business compulsion but also the belated claim of fraud in the inducement.

In its instructions to the jury, the Court first set forth the contentions of appellee in this connection (Tr. Vol. VI, pp. 2414-15) and then the contentions of appellant (Tr. Vol. VI, pp. 2415-16).

After having stated the respective contentions of the parties, the Court then came to the all important question of the legal effect of the explicit provisions of the written agreements in the event that the jury rejected appellant's contention that it had been induced to enter into them by business compulsion and by fraud. On this crucial point the court charged as follows (Tr. Vol. VI, p. 2417) :

*"I charge you that * * * these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure unless you are convinced that these an-*

nual agreements signed by Anderson Buick Company were involuntary acts on its part or acts done in reliance upon a fraudulent representation or a fraudulent non-disclosure and were therefore neither a surrender of its right to rely upon a representation made to it by (2668) General Motors as to its policy to renew the distributorship or of the right to believe that General Motors had fully and fairly disclosed to it all matters which in fair dealing General Motors should have disclosed because of the relationship between them."

Appellant made no objection and took no exception to the foregoing instructions of the Court on this basic and fundamental issue. Appellant thus conceded that if the jury should find that appellant had *not* entered into the agreements as a result of business compulsion or fraud, the express provisions of these written agreements constituted, as a matter of law, an absolute and complete bar to any claim for damages based upon asserted reliance upon any alleged misrepresentation or non-disclosure by appellee.

Both by its general verdict for appellee and by its answers to Interrogatory No. 10 (Tr. Vol. II, pp. 502-03), the jury found that appellant had *not* entered into any of the agreements because of business compulsion or fraud. Having properly conceded the correctness of the Court's charge that, in the event of such a finding by the jury,

"these agreements constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements or that plaintiff sustained any injury as a result of the alleged non-disclosure",

appellant cannot now be heard to argue, as it does on page 84 of its brief, that "the written dealership contracts do *not* preclude recovery by Anderson on a fraud theory." Any such contention is barred by the express provisions of Rule 51, Fed. R. Civ. P.

Thus, even if it be assumed, contrary to the fact, that any misrepresentation had been made, whether by affirmative statements or by non-disclosure, the written agreements are a complete bar to the action under the charge of the Court, acquiesced in by appellant, and the verdict of the jury.

IV.

THE COURT DID NOT ERR IN CHARGING THE JURY THAT NO RECOVERY COULD BE BASED UPON AN ALLEGED MISREPRESENTATION IN JULY 1947.

APPELLANT'S SPECIFICATION OF ERROR NO. II IS WITHOUT MERIT.

Appellant contends, under Specification of Error No. II (Br. p. 82), that the judgment below should be reversed because of the Court's alleged error in charging the jury that no recovery could be based upon an alleged misrepresentation in July 1947. The contention is without merit for a number of reasons.

A. Appellant's Claim of Error is Barred by Rule 51, Fed. R. Civ. P.

The Court found, as a matter of law, that appellant's own version of Mr. Nash's telephone conversation with Mr. Anderson in July 1947, failed to establish any actionable misrepresentation and that there

was not even an alleged actionable representation until November 9, 1951 (Tr. Vol. VI, p. 2475). In its charge to the jury, the Court set forth in detail Mr. Anderson's version of the conversation (Tr. Vol. VI, p. 2393) as well as Mr. Nash's conflicting version (Tr. Vol. VI, pp. 2393-94). The Court then charged that while no recovery could be based thereon, the jury could and should consider the conflicting versions in connection with their consideration of the similarly conflicting versions of the conversation of November 9, 1951 (Tr. Vol. VI, p. 2401).

Appellant made no objection and took no exception to the Court's instructions in this respect and, accordingly, is barred by the provisions of Rule 51, Fed. R. Civ. P. from any claim that the Court erred in so charging the jury. While appellant took an exception to an initial ruling made by the Court for the benefit of appellant's counsel during the course of appellant's own case (Tr. Vol. IV, p. 1573), appellant abandoned its contention that the July 1947 conversation constituted an independent basis of recovery by failing to object to the instructions given to the jury at the close of the entire case after appellee's evidence on the matter had been presented.

The requirement of Rule 51 that a party must make an objection "stating distinctly the matter to which he objects and the grounds of his objection" is for the protection of the Court as well as the parties. *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 181 F.2d 880 (8 Cir. 1950), cert. den. 340 U. S. 865 (1950); *Husky Refining Co. v. Barnes*, 119 F.2d 715, 717 (1941); *Thiel v. Southern Pac. Co.*, 149 F.2d 783, 788, rev'd on other grounds 328 U.S. 217

(1946); *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 676 (1951).

In the instant case, not only did appellant fail to make any objection to the Court's instructions to the jury, but even at the time of the Court's initial ruling during the course of appellant's case, appellant failed to state the grounds of its objections thereto. It is furthermore to be noted that, in addition to appellant's failure to object to the instructions, the Statement of Points filed by appellant on June 6, 1958, in accordance with the requirements of Rule 17(6) of this Court, similarly failed to include any assignment of error on the part of the Trial Court in this connection.

B. Appellant's Claim of Error Is Academic

Even if it were to be assumed, contrary to the fact, that Mr. Nash had been guilty of a misrepresentation of fact in July 1947, the Court's charge that appellant could not recover any damages therefor did not constitute reversible error. The matter was rendered wholly academic by the verdict of the jury. By its general verdict in favor of appellant, the jury necessarily found (a) that appellant's version of the July 1947 conversation was not true; (b) that Mr. Nash was without authority to make any representations or commitments with respect to the continuance of appellant's distributorship; (c) that there was no intent on the part of appellee to deceive or defraud appellant; (d) that in view of the express provisions of the written agreements, appellant was not justified in relying upon any alleged representations or non-disclosure with respect to the continuance of appellant's distributorship;

and (e) that appellant had not, in fact, acted in reliance upon any alleged misrepresentation or non-disclosure on the part of appellee.

Completely dispositive, in and of itself, of any claim of prejudicial error is the fact that the Court, with the complete agreement of appellant, charged the jury (Tr. Vol. VI, p. 2417) that the written agreements between the parties "constitute in law an absolute and complete refutation of any claim of reliance upon any representation other than those expressly set forth in the agreements", unless the jury should find that the agreements themselves had been executed as a result of business compulsion or fraud. Both by its general verdict and by its answers to the interrogatories, the jury found that appellant's execution of the agreements had not been so induced. (Tr. Vol. II, pp. 502-03). Accordingly, under the Court's charge, acquiesced in by appellant, any claim for damages based upon asserted reliance upon the alleged misrepresentation of July 1947, was barred, as a matter of law, by the written agreements between the parties. (See Point III, *supra*, pp. 66-70).

C. Appellant's Own Testimony Failed to Establish Any Actionable Misrepresentation

Appellant's own testimony (Tr. Vol. III, pp. 895-98) failed to establish any misrepresentation of existing fact by Mr. Nash. The Court held that, even accepting appellant's own version of the conversation, it was not actionable, nor did it furnish any basis for a claim that Mr. Nash had been guilty of a fraudulent misrepresentation for which appellee was answerable in damages. The statement that Mr.

Nash did not think Anderson had anything to worry about as long as he did a good job was not and did not purport to be anything more than an honest expression of opinion by Mr. Nash.

At that time, as found by the jury, appellee had neither formulated nor adopted any policy which provided for the termination of appellant's distributorship (Tr. Vol. II, p. 501). Subsequent to July 14, 1947 appellee entered into six new distributorship agreements with appellant. It was not until more than four years later that a decision was made to change the method of distribution in the Northwest area and announced at the Portland meeting of July 10, 1952 (Tr. Vol. VI, pp. 2095-97, 2197-2201; Tr. Vol. V, pp. 1974-75).

V.

THE CONTENTION, UNDER APPELLANT'S SPECIFICATION OF ERROR NO. III, THAT APPELLEE WAS NOT ENTITLED TO A DIRECTED VERDICT OR TO DISMISSAL, IS ACADEMIC.

As appellant states (Br. p. 87), this is an appeal from a judgment based solely upon the verdict rendered by the jury. Accordingly, the question of appellee's right to a directed verdict or to dismissal is not in issue upon this appeal.

The opinion which the Court read to the jury, after entry of the verdict (Tr. Vol. VI, pp. 2468-79), makes it entirely clear that if the jury's verdict had been for the appellant, the Court would have been compelled to set it aside as against the manifest weight of the evidence and contrary to law. The Court said:

“Your verdict entirely accords with my view of the case. I want to commend you for your conscientious consideration.”

VI.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT APPELLANT WAS PRECLUDED FROM CLAIMING THAT THE AGREEMENT OF NOVEMBER 1, 1952 WAS ENTERED INTO IN RELIANCE UPON APPELLEE'S ALLEGED MISREPRESENTATION AND NON-DISCLOSURE.

APPELLANT'S SPECIFICATION OF ERROR NO. IV IS WITHOUT MERIT.

Appellant's Specification of Error No. IV (Br. p. 89) is that the Court erred in charging the jury as follows (Tr. Vol. VI, pp. 2419-20) :

“I charge you that since the final agreement of November 1, 1952 was entered into after July 10, 1952—the date of the Portland meeting—there may be no claim by plaintiff that this agreement was signed in reliance upon the alleged misrepresentation or because of the alleged non-disclosure.”

Appellant's claim of error is manifestly baseless.

At the Portland meeting of July 10, 1952, appellant was notified that it would not, under any circumstances be continued as a distributor after June 30, 1953 and that any relations after that date between the parties would be solely on a dealership basis.

As a matter of simple logic, as inexorable as simple arithmetic, appellant could not have signed the agreement of November 1, 1952 in reliance upon a

representation that its distributorship *would* be continued indefinitely or in reliance upon non-disclosure of a policy to terminate the distributorship, when appellant had admittedly been notified four months earlier that its distributorship would *not* be continued indefinitely and *would* terminate on June 30, 1953.

Appellant's claim that it did not know of appellee's alleged "policy" prior to October, 1953 has no bearing upon the complete correctness of the instruction complained of. The sole point covered by the instruction was the fact that appellant could not have entered into the agreement of November 1, 1952 in reliance upon a mistaken belief, fraudulently induced by appellee, that its distributorship would be continued indefinitely — regardless of whether the fraud consisted of an affirmative representation that the distributorship *would* be indefinitely continued or a failure to disclose an intention *not* to continue the distributorship indefinitely.

Furthermore, the jury having found no fraud in the inducement of the agreements entered into by appellant *before* July 10, 1952, when it was advised that its distributorship would not be continued beyond June 30, 1953, could not conceivably have found fraud in the inducement of a contract entered into *after* appellant had been specifically so advised. (Tr. Vol. II, pp. 502-03).

Finally, appellant's claim of error in this respect is rendered wholly academic by the further basic finding of the jury that the relationship between the parties was not, in fact, one of "trust and confidence" or of such a character as to require appellee to notify appellant of its alleged policy. If

no such obligation existed, appellant, as a matter of law, could not have entered into the agreement of November 1, 1952 in justifiable reliance upon the non-existence of the alleged policy. As a matter of law, such non-disclosure could not have constituted fraud in the inducement.

VII.

SPECIFICATION OF ERROR NO. V IS WITHOUT MERIT.

The only question raised by this specification is whether the Court had authority to enter an order *nunc pro tunc* ordering a copy of the minutes as contemplated by Local Rule 56(g) (4).

While the Court had jurisdiction of the case, there can be no doubt of its authority to enter this order. As the Court stated (Tr. Vol. II, p. 526) :

"The transcript of the minutes of the trial were necessary for the use of the Court. Each trial day found the minutes on the bench and frequent reference to them was made during trial by the Court, to the knowledge of counsel. When ruling upon various motions which involved the legal sufficiency of the evidence presented, the Court referred to the trial minutes. When passing upon requests to charge and in the preparation of the charge itself, the Court had frequent occasion to examine the testimony. This was particularly so when the Court prepared its statement of the undisputed facts, as well as when the analysis of the testimony was written on matters as to which there was a conflict."

CONCLUSION

Since there was no error of law and the verdict of the jury is supported by substantial evidence, the judgment appealed from should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ABC PACKARD, INC.,

Appellant,

vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ABC PACKARD, INC.,

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vs.

GENERAL MOTORS CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Statement of Position.

This is an appeal not on facts, but on a clearly defined question of law: the error of the trial court in submitting a question of law to the jury.

Prefatory Statement.

Notwithstanding the palpable attempt of appellee to warp this proceeding into an appeal on the facts, we believe it clear from the record and from our Opening Brief that the issue before the Court is essentially one of law. More particularly, the determination of this appeal turns upon the question whether the trial court erred in submitting to the jury the issue of the existence of a duty to disclose the General Motors distributorship termination policy (hereinafter referred to as "the policy").

Our principal purpose in this brief will be to place the appeal in its proper focus.

I.

The Basic Error of the Trial Court Lies in Its Failure to Instruct the Jury That General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose the Policy.

- A. The Brief of Appellee to the Contrary Notwithstanding, the Basic Issue on the Appeal Is Whether General Motors Owed Anderson, as a Matter of Law, a Duty to Disclose the Policy.

Throughout this action, from its earliest stages, appellant conceived the issue of the existence of the duty to disclose as one of law arising out of the relationship of the parties, and requested that the trial court resolve it as a matter of law. The trial court's refusal to do so constitutes the principal error noted in our Opening Brief.¹

Rather than meet this issue squarely, on the law, counsel for appellee has attempted to convert the appeal, taken on this clear-cut proposition of law, into a dispute as to the facts, perhaps having in mind the difficulties of an appellant in attempting to persuade an appellate court to reverse on factual issues. As noted, *infra* (this Br. Point V), appellee relates "facts" based on isolated statements taken out of context, ignores the uncontradicted testimony of appellant's witnesses and the unfavorable testimony of its own witnesses, and harps on facts hav-

¹The Court's attention is invited to the fact that the trial court, notwithstanding its failure to instruct on this issue as a matter of law, conceived the issue to be one of law, and so stated in the opinion read to the jury after the rendition of the verdict [T. 2474], where the Court stated: "The compulsive force of these agreements and of the action of the parties under them leads the court to conclude *as a matter of law* that the relationship between the parties was not such as . . . impelled the disclosure of any policy which indicated the ultimate and certain discontinuance at an indefinite date in the future of plaintiff's distributorship." (Emphasis added.)

ing no materiality to any of the issues in the case. These errors and omissions are, for present purposes, merely noted in passing, to be taken up later in this brief (*infra*, Point V).

Despite our reluctance to belabor what we believe to be the obvious, the essence of Anderson's position can be stated thus: *the relationship between the parties, as established by the uncontradicted evidence, was such that General Motors, and more particularly the key General Motors officials who devised and directed the execution of the policy, owed Anderson, as a matter of law, a duty to disclose the policy. From this it follows that the submission of this issue to the jury as a factual question constitutes reversible error.*

With a recognition that the foregoing states the principal issue on the appeal, it is of no moment that there were facts in the case as to which testimony was in conflict. Nonetheless, the brief of appellee is directed primarily and principally to such factual conflicts in a manifest effort, on the part of appellee, to transform the essential simple questions of law into questions of fact. Our purpose in the following portions of this brief is to place the appeal once more in proper focus.

B. The Special Verdict, Amply Supported by the Evidence, Established All of the Elements of Plaintiff's Claim Other Than the Duty to Disclose.

1. Appellant Is Proceeding on a Nondisclosure Theory.

It may be helpful at this point briefly to restate appellant's theory of the case. The action is not grounded on the classic misrepresentation theory, *cum* knowledge *cum* scienter *cum* fraudulent intent *cum* etc. as detailed in *Webster v. Romano* (178 Wash. 118-120, 121, 34 P. 2d 428, 430 [1934]), cited at page 39 of Appellee's Brief.

It is rather grounded on the existence of a policy (which the jury found to exist), its nondisclosure to appellant (a nondisclosure found by the jury) in the context of a duty, which existed as a matter of law, to make such disclosure. Plainly, the concept of "intent to defraud," labored mightily by appellee at pages 39-41 of its brief, has no bearing on the case. Clearly, one proceeding, as is appellant, on a nondisclosure theory, could hardly be expected to establish "a representation of an existing fact" in the sense of *Webster v. Romano, supra*. In *Ikeda v. Curtis*, 43 Wash. 2d 449, 261 P. 2d 684, 691 (1953), the court states as follows:

"If appellants intentionally concealed some fact known to them, which it was material for respondents to know, that constituted a fraudulent concealment; that is, the concealment of a fact which one is bound to disclose is the equivalent of an indirect representation that such fact does not exist, . . ."

By the same token, it is only when a party is charged with *active concealment* that the question of fraudulent intent may assume importance. Thus, in *Lincoln v. Keene*, 51 Wash. 2d 171, 173-174, 316 P. 2d 899, 901 (1957), cited by appellee at page 41 of its brief, the court expressly states that it is setting forth ". . . the applicable general rules with reference to fraud by concealment . . ." No one questions that *Lincoln v. Keene, supra*, is good law; but it is clear that it is not applicable to this case.

Moreover, if we assume *arguendo* that fraudulent intent is an element in a nondisclosure case, it is clear that such intent may be inferred from the nondisclosure itself, as the trial court charged the jury without objection from appellee [T. 2408].

2. *The General and Special Verdicts Do Not Have the Effect Claimed for Them by Appellee.*

Appellee makes numerous unwarranted assumptions as to the effect of the general verdict. This is done in an effort to dispute the assertion that the special verdicts, amply supported by the evidence, established all of the elements of the nondisclosure theory except the existence of the duty to disclose, an issue which we respectfully submit it was error to submit to the jury in the first place. First, it is clear that the special verdict controls the general verdict where there is inconsistency, although no inconsistency appears in the instant case. The effect of the rule, as applied to this case, is that inferences may not be drawn from the general verdict which are at variance with the special findings. Thus, where the jury found specially that the policy existed [T. 501], it cannot be inferred from the general verdict that it did not; where the jury found specially that appellant failed to disclose the existence of the policy [T. 502], it cannot be inferred from the general verdict that there was disclosure; where the jury found specially that appellant had no reason to know of the existence of the policy [T. 502], it cannot be inferred from the general verdict that appellant did know.

Secondly, where the error complained of goes to an erroneous charge, the general verdict will not support the assumption that the outcome of the case would have been the same had proper instructions been given—otherwise, no appeal would ever lie on erroneous jury instructions.

The true rule, of course, is that where it appears that the erroneous instructions may have influenced the verdict, the decision below must be reversed. In the instant case, we respectfully submit that the Court must con-

clude, from the answers to the special interrogatories, that the general verdict was necessarily based upon the erroneous instruction.²

Moreover, the negative answers to certain of the other interrogatories, relied on so heavily by appellee, have their genesis in the erroneous instructions as to the existence of the duty to disclose. Thus, in Interrogatory No. 9(a), the jury was asked whether appellant had taken action in ignorance of a matter “*. . . which General Motors was required to disclose to Anderson . . .*”; in Interrogatory No. 10B, the jury was asked to give certain answers as to appellant’s conduct “*. . . because of a nondisclosure of a matter which General Motors was required to make to Anderson . . .*”

It is clear that the Court, in submitting interrogatories in this form, confirmed its basic error, an error which permeated the entire proceeding below.

Not only did the jury find, but appellee does not deny, the existence of the policy or General Motors’ failure to disclose it to Anderson.³ There is no merit to the suggestion that some species of “waiver” precluding the raising of this issue on appeal arises from the manner in which appellant made its objection to the jury charge bearing upon the materiality of the policy [T. 2400]. In the light of a specific exception taken to the refusal of the Court to instruct as to the existence of the duty

²While the jury’s answers to interrogatories Nos. 3 and 5, coupled with its answer to interrogatory No. 4, leaves the precise date when the policy was formulated in doubt, that fact is of no materiality on the present appeal since it is clear that it was subsequent to November 1, 1951 that the \$500,000.00 indebtedness was incurred.

³That it cannot be denied is clear from the letter of Harlow H. Curtice, president of General Motors, quoted at pages 23-24 of appellant’s Opening Brief, and cited in full at T. 1956-1958, and Mr. Curtice’s testimony at pages 129-133 of his deposition.

to disclose as a matter of law, this point is manifestly without substance, but perhaps it should be noted that the portion of the charge to which reference is made by appellee went to the existence of a relationship of trust and confidence *as a matter of fact*, and the concomitant duty inherent in such relationship, and had no reference whatever to the duty of disclosure *raised in law* as to which the proposed jury instruction was refused. In addition, any policy going to the very existence of appellant's business must be material. Finally, there was no instruction as to which appellant could take exception going to the existence of a duty *as a matter of law*. This boot-strap argument defies analysis and one studies it in vain for an indication of what appellee would have had appellant do that it did not do.

In short, it is clear that the only real issue remaining in the light of the special verdicts was whether there was a duty to disclose the policy to appellant. In passing upon this question, the Court is urged to bear in mind that while the appellee is a corporation and an abstract entity in that sense, it functions through, and more to the point, formulates, executes and discloses (or fails to disclose) policy through specific people. The decision that the Anderson distributorship would be terminated when it became more profitable for General Motors to function through zones was formulated by certain key individuals charged with management of the General Motors organization, executed at the direction of these same individuals, and it was these same individuals who failed to disclose the policy to Anderson despite numerous contacts with him during the years in which the policy was in existence.

Nor was appellant a corporate abstraction. In the context of its dealings with General Motors, it, too,

functioned through specific individuals, principally Mr. Anderson himself. Negotiations and conversations were not conducted in a corporate vacuum but rather in an atmosphere of *personal* trust, *personal* friendship and dependence.⁴ Having determined the policy, Messrs. Curtice and Hufstader and their subordinates were under a duty to disclose it to Anderson, with whom they had maintained close personal ties over a period of many years, apart from those implicit in the corporate relationship—a relationship in which the same individuals dominated and controlled the major aspects of Anderson's operation.

The precise nature of the relationship and of the domination and control were discussed at length in our Opening Brief at pages 4-22, and we shall have occasion to refer to certain of its aspects in a subsequent portion of this brief. For present purposes, however, a few general observations may be in order. Whatever boilerplate ostensibly descriptive of the relationship may have been contained in the unilateral printed agreements, the operative language of the agreements and the pattern of operation imposed by General Motors upon Anderson rendered the Anderson operation completely subservient to the wishes of the individuals who controlled the policies of General Motors. In so stating, we rely not, as appellee suggests, upon facts in dispute, but upon uncontradicted oral and documentary evidence, since the point which we make on this appeal is that the *uncontroverted* facts establish the relationship from which the duty to disclose the policy flows as a matter of law. At no point in the trial or in its 78-page

⁴The Court's attention is invited to Mr. Curtice's statement that he knew of no relationship more interdependent than that with which we are here concerned [Curtice Dep. 200-212], and to Hufstader's statement to the effect that an unusual mutuality existed between the automobile manufacturer and its dealers and distributors [Hufstader Dep. 404-405].

brief did appellee deny the existence of the requirement of 10-day reports, 30-day reports, sales reports, financial reports, facilities reports, service department reports, open point reports, market penetration and price-class analyses, or the frequent "visits," meetings and inspections by General Motors' executives of the Anderson establishment. Appellee ignores them, turning its attention only to a single control device, noted in our Opening Brief, to-wit, the zone manual. Even in this connection, appellee's assertions are unsupportable, as noted hereafter, and the suggestion that this represented a form of benevolent paternalism is plainly specious.

Thus, appellee fails to meet our contention that Anderson was in fact controlled by General Motors.

Nor does appellee respond to the analysis of the legal incidents which necessarily flow from such control. As pointed out in our Opening Brief, that analysis was designed to show the existence of a duty of disclosure *as a matter of law* by virtue of this manufacturer-distributor relationship, just as such a duty would flow as a matter of law where a principal-agent relationship is shown.⁵ Instead of addressing itself to this point, appellee throws up a smoke screen tending to obscure the real issues on this appeal. For example, appellee, through the skillful use of a few phrases taken out of context, purports to reduce our position to a syllogism more to its liking than our true position. In creating this strawman, to which its argument reduces itself, appellee warps our argument to a point where appellee has us suggesting that a duty to disclose can exist only where a true confidential relation-

⁵The attention of the Court is invited to the fact that many of the elements of a principal-agent relationship are present in the relationship of the parties.

ship is present, notwithstanding that we were at pains in our Opening Brief to point out that a confidential relationship in the technical sense is not the sole basis upon which a duty to disclose could be predicated (Op. Br. 58, and cases cited).

The Court will have noted the tendency of appellee to "muddy the waters" by taking cases cited for one proposition and criticizing them for failing to support other propositions for which they were not cited, and the emphasis upon factual differences between the cases cited and the instant case.⁶

At the same time, appellee ignores the true impact of the cases relied on by appellant. For example, at page 60 of its brief, appellee dismisses *Smyth Sales, Inc. v. Petroleum Heat & Power Co.*, 128 F. 2d 697 (C. C. A. 3, 1942), and *E. H. Taylor, Jr. & Sons v. Julius Levin Co.*, 274 Fed. 275 (C. C. A. 6, 1921), which deal precisely with a manufacturer-distributor relationship. The *Smyth* case involves not a mere generalization as to good faith as suggested by appellee, but precisely the problem presented in the instant case: the duty of disclosure owing from a manufacturer to his distributor. As noted in our Opening Brief, the *Smyth* case holds that the manufacturer-distributor relationship requires full disclosure by

⁶For example, appellee seizes upon a group of cases cited solely as indicating the breadth and flexibility of the confidential relationship concept (Opening Brief 58-60) and at pages 57-60 of its brief dismisses them because they do not hold that the relationships therein discussed existed as a matter of law—a point for which the cases were not cited. Appellee further criticizes them as factually distinguishable, although they were not cited as factually similar. Indeed, in light of appellee's persistent emphasis upon immaterial factual distinctions, it may be in order to wonder whether they are suggesting that no case can be in point which involves parties other than Anderson or General Motors, or stated otherwise, that the only case in point is one which would constitute *res judicata* in the premises.

the parties—precisely the position for which we are contending in the present case (Op. Br. 67-68).

In addition, appellee contents itself, in discussing *United States v. General Motors Corporation*, 121 F. 2d 376 (C. C. A. 7, 1941), with the statement, found at pages 61-62 of its brief, to the effect that General Motors Acceptance Corporation is not involved in the instant proceeding, although the case was cited at pages 71-73 of our brief in order to show domination of dealers and distributors under facts and circumstances similar in many respects to those here.

The cavalier treatment accorded by appellee to the thoughtful and frequently cited article of Professor Keaton (Appellee's Br. 54), is typical of its treatment of the many authorities aligned against its position. Not only does appellee ignore the fact that Professor Keaton's statement that the duty of disclosure should be determined by the court as a matter of law was something separate and apart from his suggestion as to the standard to be applied, but appellee does not purport to answer the cogent reasons advanced by the writer in support of his position that the existence of the duty to disclose is properly for determination by the court rather than the jury.

Argument by analogy is a well accepted and persuasive mode of legal reasoning. Thus, it is no answer to our suggested analogy of principal and agent to the instant case for appellee to suggest that Anderson and General Motors were not principal and agent; nor does it answer the analogy of partnership for appellee to deny the existence of a partnership in a technical legal sense, a contention *never* urged by appellant. The cases cited in our Opening Brief in support of these analogies are clearly

relevant to the present case and stand squarely for the principles for which they were cited.

In short, appellee has failed to meet the contentions advanced on this appeal. An examination of the record makes the tactics of the appellee more understandable: appellee could hardly have argued otherwise in the light of the trial concessions made by its own witnesses—the very men who formulated the policy—that General Motors owed Anderson obligations of good faith, under which, in the words of Mr. Hufstader, “. . . as a matter of good faith I should think that it would be necessary and incumbent upon both parties to discuss it on the basis of mutuality of interest” [Hufstader Dep. 414].⁷

II.

Appellant's Right to Recovery Is Not Premised on Contract, and the Printed Contracts Do Not Bar Recovery of a Nondisclosure Theory.

In urging the printed contracts as a bar to recovery on a nondisclosure theory, appellee appears to reason as follows:

1. The printed contracts are controlling in the absence of fraud.
2. The jury found no fraud.
3. Therefore, the printed contracts control.

Upon analysis, it will be seen that the foregoing argument, as applied to this case, is specious.

First, as has been heretofore pointed out, the jury's finding that the agreements were not induced by fraud was premised on its determination that there was no duty

⁷We have heretofore noted the correction made by Mr. Hufstader to the foregoing testimony prior to the signing of his deposition, wherein he added the phrase “. . . in accordance with the terms of the agreement between them.” (Opening Brief 21.)

of disclosure. Had the jury been properly instructed, a finding of fraud on the part of appellee would have followed as a matter of course. In short, in premising its argument upon the jury's finding that there was no fraud, appellee seeks comfort from the very error complained of by appellant, namely the failure of the trial court properly to charge the jury with respect to nondisclosure.

Furthermore, as was pointed out in our Opening Brief, appellant's recovery is sought not on any contractual rights *per se*, but upon the violation of the duty of disclosure arising out of the relationship of the parties.

With the foregoing in mind, it is clear that even had Anderson been aware of any legal right of General Motors to terminate the distributorship under the agreements, he would be no less entitled to recovery where the nondisclosure of the policy was shown. In this regard, it should once more be emphasized that the jury expressly found that Anderson was justifiably ignorant of the policy and, of course, appellee itself nowhere disputes the jury's finding in this regard.

Finally, appellee argues that the fact that appellant did not make specific objection to the charge in regard to the effect of the printed dealership agreement weakens the position of appellant on appeal. This argument is without merit because the trial court itself expressly recognized in its charge that the printed contract would not be controlling in the case of fraudulent nondisclosure [T. 2414-2415]. Appellant did all that it was in its power to do by requesting the charge as to the existence of the duty to disclose, which the Court erroneously refused to give.

III.

The Trial Court Erred in Taking Appellant's Right to Recovery for Nash's 1947 Misrepresentations From the Jury.

The response of appellee to Specification of Error No. II, briefed at pages 82-83 of Appellant's Brief, appears to be that the jury found adversely to our position that a claim for relief based on fraud could be premised on such misrepresentations. This position is clearly untenable since the Court expressly precluded the jury from considering the 1947 misrepresentations as an independent basis for recovery [T. 1573-1574]. This contention having been withdrawn from jury consideration, appellee's argument that the general verdict resolves the issue in its favor is without support.

Appellee's reliance upon the printed contracts as obviating the effect of the error is likewise untenable, for as heretofore pointed out (see II. *supra*), the contracts are not proof against a claim of fraud. Again, appellee has failed to meet the thrust of our contentions, namely that the invasion by the Court of the jury's function with respect to the Nash misrepresentations constitutes, in itself, a sufficient basis for reversing the judgment below.⁸

IV.

The Trial Court Erred in Making the Nunc Pro Tunc Order as to the Costs of the Transcript.

In our Opening Brief, at pages 90-92, we pointed out wherein the purported *nunc pro tunc* order as to the cost of the reporter's transcript was made in violation of the

⁸Appellee's hyper-technical suggestion that the point is lost to appellant by failure to except is met by the following statement of counsel [T. 1573] which immediately followed the ruling of the Court on the point: "Mr. Horowitz: We take an exception, your Honor."

provisions of Local Rule 56(f), which restricts the court, in considering a motion to retax costs, to “. . . the same papers and evidence used before the clerk” [T. 555]. Instead of answering our contention in this regard—which we respectfully submit is unanswerable—appellee contents itself with a quotation of certain of the remarks of the Court made after the conclusion of the trial as to the supposed need for the transcript, but fails to cite a single authority or suggest a single argument to sustain the making of the order complained of. *The remarks quoted were not “. . . used before the Clerk.”*

V.

It Is Appellee Rather Than Appellant That Misstates the Facts.

To this point in this brief, our efforts have been directed toward once more placing the appeal in proper focus and meeting appellee’s attempt to obscure the basic issues with alleged conflicts in the evidence. In this portion of the brief, we shall comment briefly upon the factual inaccuracies of the appellee and its claim that we have misstated the facts.

At the outset, it should be noted that appellee’s “Statement of the Facts” ignores uncontradicted testimony of appellant’s witnesses and the testimony of appellee’s own witnesses which was unfavorable to its case, and concentrates instead on isolated statements taken from context and upon facts of no materiality whatever to any issue involved on the appeal. In many instances where appellee recites facts, the recitation is patently and demonstrably inaccurate.

For example:

1. *The Friedlander letter* [Pltf. Ex. 81; T. 1071]:
At page 37 of its brief, appellee states that the Fried-

lander letter was admitted into evidence as testing Mr. Anderson's credibility. The record demonstrates that the letter was offered by appellant and received in evidence by the Court over the objection of appellee [T. 1069]. It would be unusual indeed for a party to introduce evidence for the purpose of testing his own credibility, and it is clear from the record that the letter was offered and received because of its bearing on the existence of the policy and the date of Anderson's discovery thereof.

2. *Circumstances of termination*: In an effort to justify the termination of the distributorship, appellee paints a picture which does not square with the testimony of Messrs. Curtice and Hufstader as summarized in our Opening Brief (Op. Br. 22-26).⁹

3. *The existence of the policy*: The lengthy exposition of the history of automobile distribution, found at pages 4-6 of appellee's brief, appears to serve no purpose whatever in view of the undisputed finding of the jury that the policy existed and was unknown to Anderson, and that Anderson was justifiably ignorant of it.

⁹In Mr. Curtice's letter of June 10, 1954, plaintiff's Exhibit 8 [T. 658-660], written *ante litem motam*, he stated: "I am quite familiar with the policy of Buick Motor Division to the effect that it should handle its wholesale distribution through divisional zone offices directly with its dealers, and the program for carrying out that policy which neared completion in 1953 with the discontinuance of the Buick distributorships and the replacement thereof with zone operations in the Pacific Northwest, since I, as general manager of Buick Motor Division, approved that policy and actively participated in the effectuation of it over a period of years in different sections of the country. . . ." (Our emphasis.) In his deposition, read into the record, Mr. Curtice testified that the first step in the execution of the policy was the elimination of Noyes in 1944, the second step was the elimination of Howard in 1947 and the third step was the elimination of the Northwest distributors, including appellant, in 1953 [Curtice Dep. 145-146]. This, together with the testimony of Mr. Hufstader, can hardly be squared with appellee's rationalization found on page 12 of its brief.

4. *Profitableness of appellant's distributorship:* Appellee makes much of the fact that appellant's operation was financially successful, a proposition with which appellant does not quarrel. That appellant's operation was profitable would hardly entitle General Motors to ignore its obligation to act in good faith. Indeed, the very profitableness of the Anderson operation prior to termination and its complete ruin after termination, is convincing evidence of the substantial damage sustained as a result of the fraud.

Moreover, the suggestion that the wholesale operation functioned at a loss is completely without merit, the figures set forth at page 11 of Appellee's Brief being those furnished by its own expert witness, who, on cross-examination, made it clear that they had not been computed in accordance with sound accounting principles, but rather in accordance with the instructions of counsel.¹⁰

¹⁰Appellee's expert was Robert L. Aiken, C.P.A., Seattle resident partner for Lybrand, Ross Bros. & Montgomery. On his direct examination, he testified consistent with the statements of appellee, found at page 11 of its brief. The question of wholesale profit was explored on cross-examination, commencing at page 1802 of the transcript and with reference to defendant's Exhibit 49, quoted at page 11 of Appellee's Brief, the following colloquy took place:

"Q. Now, you had the correct picture before you when you prepared these exhibits A-45 to A-50, didn't you? A. Yes, we did.

Q. And you did not use them? A. That's right.

The Court: In what year was this \$50,000 adjustment made? A. I believe it was in 1951.

Q. (By Mr. Kadison): Is it sound accounting practice, Mr. Aiken, to use figures which you know are erroneous when the correct figures are in your possession in the preparation of analyses of books and records?

(Testimony of Robert L. Aiken.)

A. It depends on the purpose for which they are being prepared.

Q. What was the purpose for which these were prepared?

A. This court examination."

In addition, Mr. Aiken testified that he attributed no service department income to the wholesale operation [T. 1815], although he made no examination to justify his conclusion that service profits were related solely to retail [T. 1817]. He testified that he attributed no warehousing income to wholesale [T. 1818] although depreciation of the warehouse was charged against wholesale income [T. 1819]. He testified that he did not credit delivery receipts to wholesale [T. 1821], but charged delivery expense to wholesale. The Court is most respectfully urged to study the recross-examination of this witness found at pages 1844-1850 of the transcript.

Of course, it must be borne in mind that this issue, introduced into the appeal by appellee, goes to damages, a matter not before the Court on the appeal.

5. *"Negotiation" of the printed agreements:* Contrary to appellee's assertion found at pages 29-30 of its brief to the effect that the contracts were freely negotiated—made, we respectfully suggest, somewhat with tongue in cheek—the uncontradicted testimony of their own witness, Mr. Hufstader, reveals that they were in fact unilaterally prepared by General Motors and presented to Anderson on a "take it or leave it" basis [T. 1954-1955].

6. *Acknowledgement by General Motors of obligation to deal in good faith:* Among the more apparent omissions in appellee's brief is the lack of reference to the testimony of Messrs. Curtice and Hufstader, *who conceded that General Motors had an obligation to deal with Anderson in good faith* [Curtice Dep. 213-214, 215-217, 236; Hufstader Dep. 404-405, 408-411, 456].

Appellee has failed to demonstrate a single instance in which appellant has misstated the facts, notwithstanding its protestations to the contrary.

There is ample transcript support for every factual statement made by appellant.¹¹

For example:

1. *General Motors' control of Anderson:* In attempting to meet our claim of control, appellee completely ignores the discussion of the control devices employed by it (Op. Br. 8-21, 71-77). While appellee does comment briefly upon one of these devices, namely the "zone manual," its assertion that this was not a control device is contrary to the testimony of Mr. Hufstader [Hufstader Dep. 387].

2. *General Motors' pressure for increased facilities:* In denying that General Motors exerted pressure on Anderson to expand facilities, appellee ignores a mass of evidence in order to select one self-serving sentence out of context (Appellee's Br. 16-17). That pressure was in fact exerted is readily apparent from the testimony of General Motors officials as well as the uncontradicted testimony of Anderson [T. 1001-1003, 2047-2048; Hufstader Dep. 319-321, 328-329, and other passages cited at pages 16-17 of Appellant's Op. Br.).

3. *The proposed sale of the Main plant:* In asserting that Anderson's decision not to sell its main

¹¹Appellee's practice of taking several transcript references at the end of a passage in appellant's brief, which references as a group support the entire passage, and asserting that a particular reference does not support a particular portion of the passage, does not deprive the factual statement of support. Needless to say, it is somewhat surprising to find appellee thus attempting to exploit our use of a form of reference occasionally adopted in order to present a more concise and intelligible picture of the facts.

plant was not attributable in any way to General Motors' "advice" on the subject, appellee again ignores uncontradicted testimony showing Anderson's recognition of the need to consult General Motors on this matter, as reflected by the testimony of a disinterested witness [T. 1723-1726].

4. *Working capital:* It does not meet appellant's contention that General Motors exerted pressure upon Anderson to increase its working capital for appellee to point to the printed contract (Appellee's Br. 21-22). As heretofore noted, the contract itself created many of the instruments of control used by General Motors and it was in part through the contract that such pressure was exerted. The issue is not whether General Motors was correct in its assessment of the Anderson working capital needs but rather whether, after so assessing them, General Motors exerted pressure to convert its assessment into fact. That the domination by General Motors may have taken the form of benevolent paternalism did not render General Motors any less dominant or lessen its obligation to act in good faith toward Anderson. Indeed, General Motors' assumption of such a paternalistic attitude with respect to Anderson would itself be sufficient to create a duty to disclose as a matter of law. In any event, the record is replete with uncontradicted evidence of working capital pressure, both documentary and in the form of testimony from appellee's own witnesses (citations collected in Appellant's Op. Br. 14-16).

5. *The effect of the \$500,000.00 mortgage loan on working capital:* General Motors persists in insisting that the effect of the \$500,000.00 mortgage

loan following the November, 1951 conference in San Francisco did not increase working capital, notwithstanding the testimony of Mr. Aiken, General Motors' expert accounting witness, to the contrary. Perhaps the point can finally be laid at rest by quoting Mr. Aiken as follows [T. 1798]:

“Q. So that on that date (the date of the loan) the working capital was increased by \$500,000.00, was it not? A. Yes, that's right.”

6. *National Automobile Dealers Association*: In suggesting that Mr. Hufstader's demand that Anderson not seek re-election to the presidency of the National Automobile Dealers Association was a mere request, appellee ignores the real tenor of the demand as revealed by Mr. Hufstader's own testimony. This becomes apparent when the italics in the passage quoted by appellee are placed properly [T. 1864], “. . . the second item that I wanted to discuss with him was to *ask him very definitely* not to stand for re-election . . .”

Moreover, it should perhaps be re-emphasized that the question on this appeal is not what was best for Anderson but the control over Anderson exercised by General Motors. Whether that control was benevolent or malevolent is of no moment: its mere existence establishes a relationship from which a duty to disclose flows as a matter of law.

7. *Partners in Progress*: The emphasis accorded by us to President Curtice's use of the “partners in progress” concept does not spring, as appellee would suggest (Appellee's Br. 27-28) from any argument on our part that a technical legal partnership existed and, therefore, the assertion by appellee that

there was in fact no technical partnership is quite beside the point. We used the concept, as did Mr. Curtice, as evidence of the character of the relationship between the parties during the period of the distributorship. In stating that Mr. Curtice used the term "as a businessman," we assume that appellee is not implying that his statement was untrue; rather, it seems clear that in speaking of a partnership "in a business sense," Mr. Curtice was emphasizing the closeness and community of interest which characterized the relationship of General Motors, its dealers and distributors.

8. *Relative size of the parties:* The relative size of the parties, which is hardly open to dispute, may not properly be dismissed in the cavalier fashion adopted by appellee, for as pointed out in our Opening Brief (Op. Br. 22), it has an important bearing upon the question of control and dominance which characterized the relationship of the parties from which the duty to disclose flows as a matter of law.

9. *Reliance by Anderson and resulting damage:* In urging that Anderson did not in fact take action as a result of the nondisclosure by General Motors of the policy, appellee again misstates the effect of the jury's verdict (Appellee's Br. 32-34). There was nothing in the verdict or in the answers to the special interrogatories tending to support appellee's assertion that Anderson did not take action as a result of the nondisclosure, or that he was not substantially damaged as a result thereof.

Moreover, a review of the uncontradicted testimony in the trial court demonstrates complete support for the contentions of appellant in this regard

[T. 956, 957, 1027-1028, 1037-1038, 1062-1063, 1633-1634]. Thus, the record clearly establishes that the Anderson assets were one-purpose assets in the sense that they could not be used profitably for other automobile lines or other purposes. This was demonstrated by Anderson's signal lack of success in so using them following termination. Moreover, whatever relevance General Motors' arguments in this respect may have on future questions relating to mitigation of damages, they are obviously beside the point on the present appeal.

Insofar as appellee asserts that Anderson was precluded by the terms of the printed contracts from relying upon the nondisclosure, it has been demonstrated elsewhere in this brief that the contracts did not have this effect (Point II, *supra*). As we pointed out, we are not here relying on any agreement at variance with the written contracts, but assert rather that Anderson would have acted otherwise than he did had he known of the existence of the policy.

Finally, insofar as General Motors asserts that the \$500,000.00 mortgage loan was not made for use in the distributorship, we invite the Court's attention to the fact that it was a 15-year borrowing, which would never have been made had Anderson known that the distributorship, which formed the keystone of his operation, would be terminated months later.

10. *Date of discovery of fraud:* The trial court permitted the amending of the Complaint to correct an obvious error in alleging the date of the discovery by Anderson of the policy. In view of the liberal rules respecting amendments to pleadings, there does not appear to be any basis for appellee's position.

11. *The Packard and De Soto-Plymouth distributorships*: Appellee suggests (Appellee's Br. 14) that Anderson undertook negotiations for the De Soto-Plymouth distributorship prior to the effective date of the General Motors termination. It is clear from the record that negotiations looking toward this distributorship were not commenced until after the effective date of termination [T. 1075, 1296].

12. *Moneys paid appellant following termination*: The \$145,112.68 paid appellant following termination and referred to, in passing (though without reference), by appellee, at page 14 of its brief, were moneys paid by way of purchase price from General Motors to Anderson for some of the parts which Anderson carried in inventory. General Motors refused to purchase other parts [T. 2153-2154].

Conclusion.

The trial court erred in rejecting Anderson's contention that General Motors owed a duty as a matter of law to disclose the policy to terminate the distributorship. This was argued at length in the Opening Brief. Appellee has completely failed to address itself to the merits of this basic issue on the appeal, and, we submit, has thereby implicitly conceded the correctness of our position.

Accordingly, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

PACHT, ROSS, WARNE & BERNHARD,
STUART L. KADISON,
HARVEY M. GROSSMAN,
PRESTON, THORGRIMSON & HOROWITZ,
CHARLES HOROWITZ,

Attorneys for Appellant.

No. 16022.✓

IN THE

See Vol. 3074

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES MEAT AND PROVISION DRIVERS UNION
LOCAL NO. 626 OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, *et al.*,

Appellants,

vs.

LEWIS FOOD COMPANY, a corporation,

Respondent.

RESPONDENT'S BRIEF.

HILL, FARRER & BURRILL and
WILLIAM H. WILSON,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Respondent.

FILED

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PAUL P. O'BRIEN, CL

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No. 16022.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES MEAT AND PROVISION DRIVERS UNION
LOCAL NO. 626 OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, *et al.*,

Appellants,

vs.

LEWIS FOOD COMPANY, a corporation,

Respondent.

RESPONDENT'S BRIEF.

I.

The District Court Correctly Held That This Action
Should Not Be Abated Under the Doctrine of Pri-
mary Administrative Jurisdiction.

The contention of Appellants in support of their plea in abatement is that there is a proceeding pending before the National Labor Relations Board in which the bona fides of the certified union and the certification itself is to be determined and that the District Court under the doctrine of primary administrative jurisdiction should stay proceedings until the National Labor Relations Board has ruled upon such issues in its pending proceedings. The trial court has rejected this contention. The decision of the trial court is found in *Lewis Food Company v. Los Angeles Meat and Provision Drivers*, 159 Fed. Supp. 763.

Respondent's answer to Appellants' contention is two-fold: (1) The Supreme Court of the United States has ruled that this action may be brought prior to an administrative determination that an unfair labor practice has, or has not, been committed; (2) In its prior administrative proceeding against Appellants, *In the Matter of Meat and Provision Drivers Union Local No. 626* (Lewis Food Company), 115 N. L. R. B. 890, 37 L. R. R. M. 142, the National Labor Relations Board has already ruled that Appellants' affirmative defenses, which are the basis for the plea in abatement, do not constitute a valid defense in law; hence, even if the doctrine of primary administrative jurisdiction is applicable, the Labor Board has decided the issue contrary to Appellants' position.

In *I. L. W. U. v. Juneau Spruce Corporation*, 342 U. S. 237, 96 L. Ed. 275, the United States Supreme Court held that suits for damages under 29 U. S. C., section 187 may be brought in a federal district court prior to an administrative determination that an unfair labor practice has, or has not, been committed. The Supreme Court said at 96 L. Ed. 275, 281:

"Certainly there is nothing in the language of §303 (a)(4) [187(a)(4)] which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather the opposite seems to be true for the jurisdictional disputes prescribed by §303(a)(4) are rendered unfair 'for the purposes of this section only,' *thus setting apart for private redress acts which might also be subjected to the administrative process.*" (Emphasis added.)

The Supreme Court also said at 96 L. Ed. 281, 282:

"The right to sue in the courts is clear provided the pressure on the employer falls in the prescribed cate-

gory . . . Here the jurisdictional row was between the outside union and the inside union . . . Petitioners representing one union and employing outside labor were trying to get the work which another union employing mill labor had. That competition for work at the expense of employer has been condemned by the Act."

The trial court in this case stated that the remedy of the employer to recover damages under section 187 "is independent of any action the Board may take to enforce the same provision." The trial court likened this system of statutory remedies to that of a private action for treble damages by persons injured by a violation of anti-trust laws of the United States (15 U. S. C. A. sec. 15), which are in addition to the remedies by criminal and civil action instituted by the Government. (15 U. S. C. A. sec. 1-5.)

In view of the United States Supreme Court determination in the *Juneau Spruce* case, *supra*, it is clear that the doctrine of primary administrative jurisdiction, upon which Appellants' plea in abatement is based, has no application in this proceeding.

II.

Even if the Doctrine of Primary Administrative Jurisdiction Is Applicable, the National Labor Relations Board Has Already Made Its Controlling Administrative Determination Against Appellants.

The generally accepted statement of the doctrine of "primary administrative jurisdiction," is that courts will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal, where the question demands the exercise of administrative discretion requiring the special knowledge,

experience and services of the administrative tribunal to determine technical and intricate matters of fact and where a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered.

We submit that Appellants have argued themselves into a box in asserting that the doctrine of primary administrative jurisdiction is applicable, since the National Labor Relations Board has already made the administrative determination which is controlling in this case. In the case of *In the Matter of Meat and Provision Drivers Union Local No. 626* (Lewis Food Company), 115 N. L. R. B. 890, 37 L. R. R. M. 142, the National Labor Relations Board had before it the same parties and the same conduct which is the subject matter of this action. In the Labor Board proceeding brought by Respondent against Appellant, Appellants contended that they had not violated section 8(b)(4)(C) of the Labor Management Relations Act, for the reason that the certification of the certified union was invalid at the time Appellants engaged in their strike and picketing. The certification was alleged to be invalid because: (1) The certified union was company dominated, assisted and financed by Respondent in violation of section 8(a)(2); (2) No valid election was held or certification issued because the certified union was not at the time of its organization or certification in compliance with section 9(f), (g) and (h) of the Act.

These defenses, which were raised by Appellants in the unfair labor practices proceedings brought against them by the National Labor Relations Board, are the same defenses which are raised in this case and constitute the basis for Appellants' plea in abatement.

At the hearing of the charges against Appellants, counsel for the General Counsel of the National Labor Rela-

tions Board moved to strike Appellants' affirmative defenses on the ground that they did not constitute a defense in law. The trial examiner granted the motion to strike and the National Labor Relations Board affirmed. The Labor Board said at 115 N. L. R. B. 890, 901, with regard to the validity and effect of its certification of a bargaining agent and Appellants' affirmative defenses in connection therewith:

"The motion to strike the affirmative defense was granted. The Trial Examiner stated that the certification of the Association had been issued by the Board in the course of a representation proceeding, a type of proceeding over which it had exclusive jurisdiction, that the certification of the Association appeared to have been issued regularly, and to be valid and proper upon its face. He ruled that under those circumstances the Union was restricted to legal procedure to set aside, vacate, or otherwise challenge the certification. He stated that, *even if it were conceded that the action of the Board in certifying the Association was erroneous, an abuse of its discretion, or in excess of its authority, such a legal defect in the Board's determination and its certification, gave no right to the Union to decide for itself that the Board's determination was defective, and the Board's certification a nullity, and proceed to picket the Company as if the certification and the certified representative did not exist.* Fundamental legal procedure required that a decree or certificate of a judicial or quasi-judicial tribunal, issued in a proceeding of which the tribunal had jurisdiction, which appeared valid and proper on its face, be respected as valid, until either the tribunal which had issued the decree or certificate, or higher authority, vacated, set aside, or rescinded the decree in an appropriate legal proceeding.

“The Trial Examiner pointed out that the Union at any time could have filed a charge alleging Company domination or interference with the Association and had the issue fully litigated before the Board and the courts, but that the Union could not arrogate to itself the right to decide that the Board’s certification was null and void, and then picket the employer, as if the certified representative, and the certification did not exist.” (Emphasis added.)

With reference to the affirmative defense of Appellants that the certification was invalid for the reason that the certified union had not complied with the filing requirements of section (f), (g) (h) of the National Labor Relations Act, the Labor Board rejected this affirmative defense and said at 115 N. L. R. B. 890, 901, 902:

“ . . . this attack upon the certification was a matter similar to the affirmative defense previously stricken in that it involved a determination that the Board, in issuing a certification, had acted in error, or had acted improperly. It was likewise not an appropriate defense to the labor practices alleged in the complaint . . . (the Union could not arrogate to itself the right to decide that the action of the Board issuing the certification was a nullity, and proceed as if the certification and the certified representative did not exist and then later plead the Board’s alleged error as a defense. Such a procedure, if countenanced by judicial or quasi-judicial bodies, would destroy the orderly procedures of the law.” (Emphasis added.)

The National Labor Relations Board, in rejecting the affirmative defenses of Appellants, accepted the reasoning of the Trial Examiner stating at 115 N. L. R. B. 890, 891, 892:

“For the reasons set forth in the Intermediate Report, we also find that the Trial Examiner properly

rejected the Respondent's affirmative defenses that its conduct was not violative of §8(b)(4)(C) because the Association allegedly was illegally dominated at the time of its certification or because the Association allegedly was not in compliance with the provisions of §9(h) of the Act when it achieved certification."

It is apparent then that the Labor Board, in exercising its "primary administrative jurisdiction" has ruled that its certification of a union is valid until such time as it is revoked by the Board itself and that an order revoking a certification has no retroactive application. The Board has also ruled that Appellants cannot picket Respondent for recognition while there is a certified union in the plant. Of even more importance to this appeal is the fact that the Labor Board has rejected Appellants' contention that it is a defense to Appellants' conduct that the certified union may have been dominated by Respondent during certification, or that the certified union was not in compliance with filing requirements at the time of certification. The Board held, in its administrative proceeding, that the certification was issued by the Board in the course of a representation proceeding, over which the Board has exclusive jurisdiction, and that the certification is valid until either the Board or higher authority vacates, sets aside or rescinds the certification in an appropriate legal proceeding. It is the conclusion of the Board that Appellants can not decide for themselves that the action of the Labor Board, in issuing the certification, was a nullity and thereupon proceed to strike and picket Respondent.

In *Parks v. Atlanta Printing Union*, 243 F. 2d 284, cert. den. 354 U. S. 937, 1 L. Ed. 2d 1537, an employer brought an action against a union, which had not been certified as the bargaining representative of the employer's workers, for damages for causing a strike for recognition

in violation of section 303. The Circuit Court held that, under this statute making it unlawful for a union to strike in order to force an employer to bargain with it when another union has been certified and giving the employer an action for damages against the non-certified union, *the decisive factor is the certification by the Labor Board*, and the uncertified union violates the law when it strikes to force recognition, even though the certified union is no longer functioning as a bargaining representative and though it no longer represents a majority of the employees.

The Fifth Circuit also held that under section 303 Congress intended to include not only the initial certification, but the statutory process of altering or terminating certification, and a union, contending that the certified representative is no longer actively representing employees, must pursue the machinery before the Labor Board rather than to strike for recognition. The decision contains an interesting analysis of the predicament in which an employer finds himself where there is a certified union in the plant and he is faced with demands for recognition from a rival union. The Fifth Circuit stated at page 290:

“We therefore, as does the Fourth Circuit in its recent decision, *Tungsten Mining Corporation v. District 50, United Mine Workers of America*, 242 F. 2d 84, 88, hold that, in the words of the Act, the decisive thing is the certification by the Board. Until by Board action it is effectually extinguished, it has continued vitality to protect an employer against a raiding rival whose objective is ‘forcing or requiring [such] employer to recognize or bargain with * * * [it] * * * as the representative of [his] employees * * *.’”

In *Tungsten Mining Corporation v. District 50*, 242 F. 2d 84, the Fourth Circuit holds that the issuance and revo-

cation of certifications is exclusively within the province of the Labor Board and is binding upon all parties until Board action is taken in connection with the certification.

There are numerous cases which hold that the Labor Board's determination and certification of the bargaining agent is within its exclusive province. See *N. L. R. B. v. A. K. Allen Co.*, 252 F. 2d 37, 39, where it is said:

“Under §9(b) of the Act, the Board has discretion to determine the appropriate bargaining unit. The Board's determination ‘if not final, is rarely to be disturbed.’ *Packard Motor Car Co. v. N. L. R. B.*, 330 U.S. 485, 491, 67 Supreme Court 789, 793, 91 L.Ed. 1040.”

In *N. L. R. B. v. Sanson Hosiery Mills*, 195 F. 2d 350, an employer was found guilty of an unfair labor practice when he refused to honor a certification of a union as bargaining representative due to the fact that a majority of the employees no longer desired the certified union to represent them. The Fifth Circuit held that the certification of a union as bargaining representative by the National Labor Relations Board when lawfully made must be respected by an employer until changed conditions are reflected by a later ruling by the Board setting aside the certification. It is further held that an employer cannot decide for himself whether a union has lost its bargaining status as the certified bargaining representative, and, deciding that the union has lost its bargaining status, refuse to deal with it further, since that is a matter for determination by the Board. At page 195 F. 2d 350, 352, it is said:

“Such a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or

setting aside the certification. This is true, even though the bargaining agent so designed has lost its majority representation of the employees by reason of the subsequent defection of some of those originally voting for it as their representative. *The existing certification must nevertheless be honored until lawfully rescinded.*" (Emphasis added.)

Again at 195 F. 2d 350, 352-353, the Court says:

"Nor can the employer decide for itself whether the Union has lost its bargaining status, and deciding that it has, refuse to deal with it further. Whether or not the Union has lost that status is for the Board to determine upon orderly statutory procedure. *N.L.R.B. v. Prudential*, 6 Cir., 154 F. 2d 385, headnote 10. Meanwhile, it is the duty of the employer to deal with the duly certified Union."

If employers must honor certifications until lawfully rescinded, unions likewise must honor certifications until lawfully rescinded. In the words of Chief Judge Denman in *Capital Service v. N. L. R. B.*, 204 F. 2d 848, 853, "What was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act."

Let us assume for the moment that this action is abated and that some time in 1959 or 1960, it is found in proceedings against Respondent that it has illegally dominated, controlled and interfered with the certified union. What effect can that have on the legality of Appellants' actions in 1954? The Labor Board has already determined that the fact that Respondent may be dominating the certified union does not constitute a defense to picketing by Appellants for recognition while the certification is still in full force and effect. The Labor Board has already determined that the fact that the certified union may not

have been in compliance with filing requirements of the Act does not constitute a defense to picketing by Appellants for recognition so long as the certification is still in full force and effect.

The Labor Board has already held, in effect, that the outcome of its proceedings against Respondent can have no effect insofar as the legality of Appellants' actions in 1954 are concerned. This is the controlling determination made by the administrative body. Even if the doctrine of primary administrative jurisdiction is applicable, the administrative determination has been adverse to Appellants' contentions.

Of course, a person may sue in the courts when the administrative question has been settled in a prior administrative proceeding. This is true, even though he was not a party to such a proceeding. (*A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774.) There seem to be little question, however, that Respondent was a party to the prior administrative proceeding, since Respondent filed the charge against Appellants. See Section 102.8, Rules and Regulations of the National Labor Relations Board, defining a "party" to Board proceedings as including the person filing the charge.

The proceedings against Respondent can have no bearing on this litigation. The National Labor Relations Board has so ruled. (*Meat and Provision Drivers Union Local No. 626 (Lewis Food Company)*, 115 NLRB 890.) Therefore, no purpose can be served in abating this action pending a Labor Board hearing which can have no effect on the outcome of this case.

Conclusion.

The decision of the District Court, in refusing to abate the action, should be upheld for the following reasons:

1. The *Juneau Spruce* case holds that the District Court may proceed prior to a Labor Board determination of unfair labor practices.

2. The Labor Board has already made its decision that the proceedings against Respondent can have no effect on the outcome of this case since the Board's certification of a bargaining agent is valid and must be respected by Appellants, until revoked or rescinded by the Board, or higher authorities, in appropriate legal proceedings.

Respectfully submitted,

HILL, FARRER & BURRILL and
WILLIAM H. WILSON,

By RAY L. JOHNSON, JR.,

Attorneys for Respondent.

No. 16032 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

FERNANDO S. FORFARI,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division

FILED

NOV 14 1958

PAUL P. O'BRIEN, CLERK

No. 16032

United States
Court of Appeals
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UNITED STATES OF AMERICA, Appellant,

vs.

FERNANDO S. FORFARI, Appellee.

Transcript of Record

Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, FIRST CORPORATION, a
corporation, Defendants.

COMPLAINT FOR DAMAGES

Plaintiff for his complaint and cause of action against the Defendants herein, respectfully represents to the Court and alleges as follows:

I.

That Plaintiff resides in the City of Vallejo, County of Solano, State of California, the same being within the Northern Division, Northern District of California, in the District Court of the United States;

II.

Plaintiff brings this action against the Defendant United States of America pursuant to the provisions of the Federal Tort Claims Act, Public Law 601, 9th Congress, Title IV, as amended, (Title 28, U.S.C.A. Sections 921 et seq.), as amended, hereinafter called the act, and is demanding Fifteen thousand (\$15,000.00) Dollars in damages for personal injuries and loss of property;

III.

That First Doe, Second Doe and First Corporation, a corporation, are sued herein by fictitious names for the reason that their true names are to the Plaintiff unknown, and when their true names are ascertained, the Plaintiff will ask leave of the Court to substitute their true names for the said fictitious names, together with the appropriate charging allegations;

IV.

That at all times hereinmentioned the United States Navy is a Governmental Agency, acting for and in behalf of Defendant United States of America herein; that the aforesaid United States Navy, its agents, servants and employees, in conjunction with its other facilities, maintained, controlled and operated for and in behalf of said Defendant, a Commissioned Officers Mess, at Mare Island Naval Shipyard, Mare Island, State of California, and provided therein a certain stairway from the kitchen to the wash room, used in connection therewith for the use, and so intended the use, and convenience of the tenants, their employees and the general public, and was so used by them;

V.

That on or about the 21st day of November 1951, at or about the hour of 1:00 o'clock p.m., while in the course and scope of his employment as chef for Mare Island Cafeteria System, without fault or negligence on his part, and in the exercise of due care and prudence while descending the aforesaid

stairway at said premises, was caused to and did fall down said stairs, negligently maintained by said Defendant United States of America, by its agents, servants and employees; that Defendant negligently and carelessly permitted the said stairway to become and remain unsafe, insecure, unlevel, dangerous, and otherwise defective and out of repair, with metal stair tread elevated and projecting, as to be dangerous to the life and limbs of persons traversing said stairway, as Defendant well knew, and of which condition had both actual and constructive notice and full knowledge of the unsafe and dangerous character of said stairway and negligently permitted it to remain in such condition; and negligently and carelessly failed to place any sign or notice to indicate the danger incident to the aforesaid condition and to remedy said condition; that wholly and solely by reason of, and as a direct and proximate result of the negligent and careless acts and omissions of the Defendant as aforesaid, said Plaintiff was caused to and did fall and was precipitated down said stairway and thereby sustained and was proximately caused to receive, and did thereby receive and suffer severe and grievous personal and bodily injuries and damages as follows, to-wit:

Said Plaintiff was rendered sick, sore, lame and disabled and did suffer great and grievous pain and suffering; he sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back; Plaintiff is informed and believes that said injuries are permanent in character; that by

reason of his said injuries and of the said pain, suffering and sickness which are continuing, and as a proximate result thereof, Plaintiff has been damaged in the sum of Fifteen thousand (\$15,000.00) Dollars;

VI.

That by reason of aforesaid negligence and as a proximate result thereof, expenses for the medical attention of Plaintiff in the sum of \$235.76 was incurred; that at the time of his said injuries Plaintiff was capable of earning not less than \$375.00 per month; that as a proximate result of the negligence of the Defendant and the resulting injuries so sustained, Plaintiff was unemployable to July 7, 1952, to his further damage; that under the circumstances the persons responsible for the maintenance, control and operation of said stairway, if they were private persons, would be liable to the Plaintiff for his damage for the negligent maintenance, control and operation of said stairway;

VII.

That all of the injuries to the Plaintiff herein described and the pain, suffering, disability, loss, expense and damages incident thereto, were proximately caused by the carelessness and negligence, as aforesaid, of the Defendants and each of them, their servants, agents and employees.

Wherefore Plaintiff prays judgment against Defendant for the sum of Fifteen thousand (\$15,000.00) Dollars, general damage, special damages as

alleged, cost of suit and for such other and further relief as to the Court may seem meet.

/s/ THOMAS M. MULVIHILL,
Attorney for Plaintiff

Duly Verified.

[Endorsed]: Filed November 19, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America and by way of answer to the complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph IV of the said complaint, defendant denies that said stairway was used or intended for the use of any tenants, employees of tenants, or the general public or that said stairway was so used by any tenants, employees of tenants, or the general public.

II.

Answering paragraph V of the said complaint, defendant denies that it or any agent or servant of the United States was negligent or careless in any respect and further denies that any premises within the charge of the United States or of any agency or employee of the United States was in a dangerous or defective condition or that any premises within the charge of the United States or any agency or employee of the United States was un-

safe, insecure, unlevel, dangerous, or otherwise defective or out of repair. Said defendant further answering said paragraph alleges that he does not have sufficient facts to know the truth or falsity of the other allegations therein contained, and denies each and every, all and singular, of the other allegations therein contained.

III.

Answering paragraph VI of the said complaint, said defendant, always denying that it was negligent or careless in any respect and always denying that any agency or employee of said defendant was negligent and careless in any respect, alleges that it does not have sufficient facts to know the truth or falsity of the allegations therein contained, and denies each and every, all and singular, of the allegations therein contained.

IV.

Answering paragraph VII of the said complaint, said defendant, always denying that it was negligent or careless in any respect and always denying that any agency or employee of said defendant was negligent and careless in any respect, alleges that it does not have sufficient facts to know the truth or falsity of the allegations therein contained, and denies each and every, all and singular, of the allegations therein contained.

As and for a Separate and Distinct Defense to said Complaint said Defendant alleges as follows:

I.

That the plaintiff above named was himself negli-

gent and careless in the premises and did not exercise due and proper care for his own safety upon the said stairway and that said negligence and carelessness and said lack of proper care proximately contributed to the injury alleged by said plaintiff, if any.

As and for a Third Separate and Distinct Defense to the Complaint on file herein, said Defendant alleges as follows:

I.

That said Mare Island Cafeteria System is an unincorporated association wholly owned and controlled by the defendant United States of America; that the plaintiff was an employee of said Mare Island Cafeteria System and as such employee may not maintain an action against the United States of America under the Federal Tort Claims Act, Public Law 601, 79th Congress, Title IV, as amended (Title 28 USCA Sections 921, et seq.)

Wherefore, said defendant prays that said complaint be dismissed with costs assessed to the plaintiff.

Dated: January 25th, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By JAMES S. EDDY,

Assistant U. S. Attorney

Notice of Mailing attached.

[Endorsed]: Filed January 25, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

By this action, plaintiff seeks to recover for personal injuries which he sustained as a result of a fall down a staircase in a building owned by the United States at the Mare Island Naval Yard, Vallejo, California. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a nonappropriated fund agency organized for the purpose of supplying food to the Naval Yard employees, working in the Commissioned Officers' Club, also a nonappropriated fund agency. The action is based on the provisions of Title 28 U.S.C.A. §1346(b), with the negligence of the United States claimed as being, (1) The failure to provide hand-railing for the staircase, (2) The protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard, and (3) The failure to properly light the staircase. Defendant, United States of America, bases its defense on the grounds that plaintiff was contributorily negligent, and that plaintiff was an employee of the United States, and thus not entitled to recover under the Federal Tort Claims Act.

This action was tried by the Court sitting without a jury on October 24, 1956, at the conclusion of which trial, the Court ordered the matter submitted. For good cause, the Court, on November 1, 1956, vacated its previous order submitting the case for decision, and ordered both parties to submit

posttrial memoranda. On November 15, 1956, in compliance with the order of the Court, plaintiff filed his memorandum. Under the terms of the Court's order, defendant was required to file its answering memorandum within fifteen days after receipt of plaintiff's opening memorandum, and plaintiff was given the right to reply thereto. Counsel for plaintiff has certified that a copy of his opening memorandum was mailed to counsel for defendant, United States, on November 14, 1956. Upon examination of the file by the Court on July 22, 1957, the record disclosed that counsel for defendant has not only failed to make any effort to comply with the time limitation set forth in the Court's order, but has failed to file any memorandum whatsoever. The record is devoid of any reasons for this delay, if, indeed, such dereliction could ever be justified. Sufficient time having elapsed to allow defendant to make a response, it appears obvious from the record that defendant does not intend to respond. Accordingly, the matter has been ordered submitted as of July 22, 1957.

The failure of defendant to afford the Court any help in this matter might be taken as an indication that it does not desire to contest the contentions made by plaintiff. Certainly it puts the Court in the unenviable position of having to do the work that properly should be done by counsel for defendant.

Defendant contends that plaintiff is without status to propel a Federal Tort Claims action. With

this, the Court does not agree. Plaintiff argues that he has a right to recover from defendant for his injuries (he not being an employee of defendant at the time of the accident) under the common law rules of negligence. His position in this regard appears to the Court to be sound. The remaining issues to be resolved are whether defendant was negligent, and whether plaintiff was guilty of contributory negligence. From the record and the applicable law, it appears to the Court that defendant was negligent in its conduct toward plaintiff, and that plaintiff was not guilty of any negligence which contributed to the accident and/or his injuries.

The Court is of the view that on the issue of liability the judgment must be for plaintiff.

It Is, Therefore, Ordered that judgment be for the plaintiff on the issue of liability in this case, and that this case be set down for further trial on Friday, September 13th, 1957, for the purpose of fixing the damages sustained by the plaintiff. Each of the parties will be prepared to proceed on this date to present to the Court any evidence that may bear upon the issue of damages in this case. The issue of damages is the sole question that will be considered by the Court on the date last mentioned above.

Dated: August 2nd, 1957.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed August 2, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This Court has heretofore resolved the issue of liability in this case and supported its opinion in that regard by a Memorandum and Order, filed herein on August 2, 1957. By that order the matter was set down for further trial on the issue of damages on September 13, 1957. The trial on the issue of damages came on regularly for hearing on this latter date. Both parties appeared by their respective counsel, and in due course the matter was submitted for decision and determination by the Court.

After having given full consideration to all of the evidence adduced in this case, the Court has come to the conclusion that plaintiff is entitled to recover from the defendant, United States of America, damages in the sum of \$12,673.26, and accordingly judgment will be entered in favor of the plaintiff and against the defendant in this amount.

It Is, Therefore, Ordered that plaintiff have judgment against the defendant, United States of America, in this action in the sum of \$12,673.26 (This includes both general and special damages), together with any costs which may be authorized by law. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment and any and all other documents necessary to the final disposition of this case in accordance with this order, and lodge them with the Clerk of this Court at the time

and in the manner prescribed by the applicable rules and statutes.

Dated: December 31, 1957.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed December 31, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled Court, the Honorable Sherrill Halbert, United States District Judge, presiding, without a jury, on the 24th day of October, 1956, and thereafter continued to September 13, 1957, the plaintiff appearing by his attorney, Ernest E. Emmons, Jr., and the defendant appearing by Lloyd H. Burke, United States Attorney by Robert E. Woodward, Assistant United States Attorney, and evidence, oral and documentary, having been introduced, and the matter having been submitted for decision, the court being fully advised, hereby makes the following:

Findings of Fact

The Court finds:

1. That this Court has jurisdiction of this cause of action by reason of the provisions of the Federal Tort Claims Act, Title 28, U.S.C., Section 921-946. That on November 21, 1951, at or about 1:00 o'clock

p.m., plaintiff sustained personal injuries as a result of a fall down a staircase in a building owned and maintained by the United States of America, located at the Mare Island Naval Yard, Vallejo, California.

2. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the naval yard employees. Plaintiff was working in the Commissioned Officers' Club, also a non-appropriated fund agency.

3. That on the date of plaintiff's accident and fall as aforesaid, the defendant, United States of America, was negligent in:

(1) Failing to provide a hand rail on the right hand side descending of said staircase,

(2) Permitting the protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard to persons walking down said steps, and

(3) Failure to properly light the staircase at the time in question.

4. At the time of plaintiff's said accident and fall, plaintiff was not an employee of the defendant, United States of America.

5. That at the time of plaintiff's accident and fall, as aforementioned, plaintiff was not guilty of contributory negligence.

6. That under the laws of the State of California, liability would be imposed upon the defendant, United States of America, if a private person.

7. That by reason of the negligence of the defendant as aforesaid, and as a direct and proximate result thereof, plaintiff sustained personal injuries as follows:

An oblique fracture of the lower end of the left fibula, sprain of the low back, exacerbation of pre-existing infirmities and was made sick, sore, lame and disabled;

that such disability is permanent in character.

8. That by reason of the negligence of the defendant and as a proximate result thereof, plaintiff required and received medical and hospital care and attention supplied and paid for by the California State Fund Insurance Company, insurance carrier for plaintiff's employer, in the amount of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76).

9. That plaintiff, for many years, was unable to perform his regular occupation as a cook, thereby suffering loss of wages.

Conclusions of Law

From the foregoing facts, this Court finds, as conclusions of law:

That plaintiff is entitled to recover damages from the defendant, United States of America, and is entitled to judgment as follows:

1. For the sum of Twelve Thousand Six Hundred Seventy Three and 26/100 Dollars (\$12,673.26); and

2. For his costs incurred herein; and

3. That California State Fund Insurance Company has a lien against plaintiff's recovery herein in the sum of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76) for compensation and medical services paid to and on behalf of plaintiff.

Let judgment be entered accordingly.

Dated: This 5th day of February, 1958.

/s/ SHERRILL HALBERT,
United States District Judge

Certificate of Service by Mail attached.

[Endorsed]: Filed February 5, 1958.

In the District Court of the United States, Northern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, FIRST CORPORATION, a
corporation, Defendants.

JUDGMENT

This cause having come on regularly for trial before the United States District Court for the Northern District of California, Northern Division,

Honorable Sherrill Halbert, United States District Judge, presiding, with Ernest E. Emmons, Jr., and Thomas M. Mulvilhill, by Ernest E. Emmons, Jr., appearing as attorney for the plaintiff, and Lloyd H. Burke, United States Attorney, by Robert E. Woodward, Assistant United States Attorney, appearing for the defendant, United States of America, and the Court being fully advised in the premises and having filed herein his Findings of Fact and Conclusions of Law and having directed that judgment be entered in accordance with said Findings of Fact and Conclusions of Law,

Now, Therefore, by reason of the law and findings as aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America, in the sum of Twelve Thousand Six Hundred Seventy Three and 26/100 Dollars (\$12,673.26) and for his costs incurred herein, taxed at \$89.26; and

2. That the California State Fund Insurance Company be awarded, out of the recovery of plaintiff herein, to be paid out of but not in addition to the judgment herein, the sum of Four Thousand Eighty Five and 76/100 Dollars (\$4,085.76).

3. That Ernest E. Emmons, Jr., and Thomas M. Mulvilhill, as plaintiff's attorneys, be awarded twenty (20%) per cent of the recovery of plaintiff herein, to be paid out of but not in addition to the judgment herein.

Done in open court this 5th day of February, 1958.

/s/ SHERRILL HALBERT,
United States District Judge

Entered in Civil Docket February 5, 1958.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Memorandum and Order dated December 31, 1957, in which it was ordered plaintiff have judgment against the defendant United States of America in the sum of \$12,673.26, together with any costs which may be authorized by law, and from the Judgment entered in this action on February 6, 1958.

LLOYD H. BURKE,
United States Attorney,
/s/ By ROBERT E. WOODWARD,
Assistant U. S. Attorney
Attorneys for Appellant United
States of America

[Endorsed]: Filed February 26, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Complaint.

Motion to dismiss.

Minute order denying motion to dismiss.

Answer.

Memorandum and order filed Aug. 2, 1957.

Memorandum and order filed Dec. 31, 1957.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Order extending time to docket appeal.

Order extending time to docket appeal.

Designation of contents of record on appeal.

Plaintiff's exhibits 1, 2 and 3.

Defendant's exhibits A, B, C and D.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 26th day of May, 1958.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By C. C. EVENSEN,

Deputy Clerk

In the District Court of the United States, North-
ern District of California, Northern Division

No. 6772

FERNANDO S. FORFARI, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

REPORTER'S TRANSCRIPT

Wednesday, October 24, 1956

Friday, September 13, 1957

Before Hon. Sherrill Halbert, Judge.

Appearances: For the Plaintiff: Ernest E. Emmons, Esq. For the Defendant: James S. Eddy, Esq., and Robert E. Woodward, Esq., Assistant U. S. Attorneys. [1*]

Wednesday, October 24, 1956, 10:00 a.m.

The Clerk: Case No. 6772, Forfari vs. U. S., trial by Court.

The Court: Are you ready to proceed, gentlemen?

Mr. Eddy: Yes, your Honor.

Mr. Emmons: Ready, your Honor.

The Court: Mr. Eddy, you were not in the court room a few moments ago; Mr. Woodward was here, and I told Mr. Emmons that I proposed to try the question of liability in this case before I consider

* Page numbers appearing at top of page of Reporter's Transcript of Record.

the matter of the damages in the case, because I thought that the question of liability was one that was so thoroughly debatable that I ought to save either side the expense of bringing medical testimony here until we knew just where we were going from that standpoint.

Mr. Eddy: That is quite satisfactory.

The Court: So that is the way I propose to proceed. I also said that if it developed it was necessary to take some time to arrive at a conclusion I will grant you time within which to get your medical testimony before the Court, so you don't need to worry about being cut off at the pockets, either side.

Mr. Eddy: Very well, your Honor.

The Court: All right, proceed.

Mr. Emmons: If your Honor please, I have one witness here who came up from San Francisco, who represents the [2] State Fund Insurance Company. All he will do is establish the amount of the compensation——

The Court: Can't you stipulate to that?

Mr. Emmons: Can you stipulate to that?

Mr. Eddy: I believe I have the amount in the file.

The Court: Well, see if you can't get together. Take a moment here and see if you can't get together.

Mr. Emmons: The amounts are \$235.76 for medical expenses; temporary compensation, \$1350, and settlement payment in regard to permanent dis-

ability rating in the sum of \$2500. That is a total of \$4,085.76.

Mr. Eddy: If your Honor will give me just a moment, I believe I have those figures in some official communications.

The Court: All right. Do you have a gentleman here who can produce the figures? Take a look at those records, Mr. Eddy.

Mr. Emmons: Do you have your figures?

The Court: Bring them up here and let counsel look at them, will you please?

Mr. Emmons: Show them to Mr. Eddy, please?

The Court: Those figures would have no bearing on this case, any how, except insofar as they have any lien against any judgment I grant in this case.

Mr. Eddy: I will stipulate that \$235.76 was spent by the State Compensation Insurance Fund for medical attention, and [3] \$1350 was spent by the State Compensation Insurance Fund for temporary compensation payments, and that \$2500 was spent by the State Compensation Insurance Fund in settlement of a claim for permanent injury in this matter.

Mr. Emmons: I will accept that stipulation. May the witness be excused.

The Court: This gentleman may be excused, then.

Mr. Eddy: Yes, as far as the government is concerned.

The Court: Let us proceed. I may say that I have read your memos, each of your memos in this matter and I am familiar with those facts.

Mr. Emmons: Will you step up, please?

FERNANDO S. FORFARI

the plaintiff, called in his own behalf, sworn.

Direct Examination

Mr. Emmons: Q. Will you state your full name for the record, please?

A. Fernando S. Forfari.

Q. Where do you live, Mr. Forfari?

A. I live 855 Sonoma Boulevard.

Q. Sonoma Boulevard in Vallejo, California?

A. Vallejo.

Q. Will you tell us your age, Mr. Forfari?

A. I beg your pardon?

Q. What is your age? [4]

A. My age is—born in 1876. I would be about 80 years old, I guess.

Q. How old are you? A. About 80.

Q. You will be 80 next month?

A. No, last July.

Q. You were 80 last July?

A. Yes, July 17th.

Q. Now, do you remember having had an accident on November 21, 1951? A. Yes.

Q. And where were you working at that time?

A. I was working on the club there at Mare Island.

Q. At Mare Island? A. Yes.

Q. That is at the Navy yard, is it?

A. Yes.

(Testimony of Fernando S. Forfari.)

Q. Were you working at the Officers' Club there?

A. For the Officers' Club, yes.

Q. And who were you employed by?

A. Employed by the Cafeteria System.

Q. The Mare Island Cafeteria System, is that right? A. Yes.

Q. Now, how long had you worked for the Mare Island Cafeteria System— [5]

A. Well—

Q. Wait just a minute until I finish. —before you got hurt? A. Oh, before I got hurt?

Q. Before you got hurt.

A. Nine or ten months, I forget, something like that.

Q. And how much money were you making there at that time? What was your rate of pay?

A. The rate was about 350 a month, I guess.

Q. 300 what? A. A month.

Q. 360 a month?

A. I mean 50, 350 a month.

Q. 350 a month? A. About.

Q. And what kind of work did you do there?

A. Chef work, you know, prepare all the dinners and everything.

Q. You were a cook, is that right?

A. Yes, cook, yes.

Q. Where had you worked before that job, Mr. Forfari?

A. Before that I was working on the Senator Hotel.

(Testimony of Fernando S. Forfari.)

Q. Here in Sacramento? A. Yes.

A. And how long did you work at the Senator Hotel?

A. About 22 or 23 months, something in there.

Q. And from that job you went to the one at Mare Island? A. Yes.

Q. How long have you been a cook?

A. Oh, a long time. I was cooking home, you know, in Brickley.

Q. Now, do you remember on the day of this accident, November 21, 1951? A. Yes.

Q. What time did you go to work on that day?

A. About 1:00 o'clock.

Q. About 1:00 o'clock. And were you on the premises of the Officers' Club there at that time?

A. Yes.

Q. And that is where you reported for work, is it? A. Yes.

Q. And about what time did this accident happen?

A. Oh, about one o'clock. I just went up stairs to the lavatory and then to come down to check the kitchen and then I fell down the steps.

Q. Now, let me see. Had you as yet gone into the kitchen to work? A. Yes.

Q. You had already gone into the kitchen to work? A. No.

Q. Not yet? [7] A. Not yet.

Q. You went upstairs to the lavatory?

A. Then come down.

(Testimony of Fernando S. Forfari.)

Q. And it was coming down the stairs that this accident happened, is that right?

A. That is when it happened.

Q. How many stairs are there at that particular place?

A. Oh, about nine steps, I guess.

Q. And do you know about how deep the risers are between the steps?

A. Well, I don't remember. I measured then, I remembered, but I don't remember.

Q. You don't remember that now?

A. No.

Q. Do you remember the width of the stairs, how wide the stairs were?

A. No, I can't remember that. I marked them down and give them to the attorney.

Q. Yes. Let me ask you this: you went up the stairs to the lavatory. Now, is the lavatory right directly in front of the top of the stairs or to the right?

A. It is to the right side.

Q. To the right, is it? A. Yes.

Q. Is there a hall that goes to the right? [8]

A. To go in.

Q. Is there a light in that hall?

A. On the ceiling, yes, a light, yes.

Q. Was there a light at the time of this accident directly above the stairs in any place?

A. I don't remember exactly if there was any light or not. It was a kind of dark day, you know what I mean, a gloomy day.

Q. Was it light above the stairs?

(Testimony of Fernando S. Forfari.)

A. No, I didn't see any.

Q. No lights there. And as you walked down the stairs could you see the stairs clearly?

A. No, couldn't see.

Q. Where was the light? The only light that you remember, where was that located?

A. When I come down the light was in the back of me.

Q. The light was to your back? A. Yes.

Q. As you were going down the steps?

A. As I was going down the steps.

Q. So that light would be in the hallway, is that right? A. Yes.

Q. And then as you left the lavatory and going down this hall you had to make a left turn to go down the stairs, is that right? A. Yes.

Q. Can you tell us what if anything was on the stair treads [9] themselves?

A. On the stairs there was nothing there, only plain wood.

Q. The stairs were plain wood, is that right?

A. Yes.

Q. Did it have a metal strip on it?

A. It had a metal strip on the front of the steps, just a very narrow metal strip.

Q. A very narrow metal strip? A. Yes.

Q. Was it in front of each step?

A. Every step, yes.

Q. And was there a handrail on either side—

A. No rail at all.

Q. —of the stairs? A. No.

(Testimony of Fernando S. Forfari.)

Q. There was not. On either side of the stairs as you went down was a blank wall?

A. A wall on both sides, yes.

Q. If you stood there in the middle of the stairs could you reach out and touch the walls with your hands?

A. I don't think so. I might. I forget, I don't know.

Q. You forget how wide it was?

A. I don't think I could reach both sides, no.

Q. Now, when you came out of the lavatory, Mr. Forfari—strike that, please. Can you tell us how far you got down the [10] stairs before you fell? How many steps had you gone down?

A. The second step, I guess. First I stepped down and then the second step I tripped down on my shoes and then I went, my balance went down.

Q. Do you recall what caused you to trip?

A. Well, the metal there caught me on my heel.

Q. Your heel caught on that metal strip?

A. On the metal strip, yes.

Q. Then what happened to you?

A. Then I fell down then.

Q. You fell down? A. Yes.

Q. Did you fall all the way down the remainder of the stairs to the bottom?

A. It was about three steps before I got down, yes.

Q. And when you fell did you feel any pain?

A. Oh, yes.

Q. Did you have pain immediately?

(Testimony of Fernando S. Forfari.)

A. Had pain right away, yes.

Q. When you fell to the bottom of the stairs what happened to you then? Did anybody help you?

A. Then I hollered then and then the fellow come over there and he give me a hand there, he put me in the chair and then he called the manager, and the manager take his car and take me down to the dispensary. [11]

Q. To the dispensary? A. Yes.

Q. What did they do for you at the dispensary?

A. At the dispensary the doctor examined me, he say you have got a broken ankle, you have got to go to the hospital. And he says, "You work for the cafeteria, I can't put you in the government hospital, because you don't work for the government."

Q. I see.

A. So he called up Vallejo.

Q. General Hospital?

A. General Hospital, and the ambulance come and took me over there.

Q. Do you recall how long you were there?

A. Oh, approximately three or four days, something like that, I forget.

Q. What did they do for you when you first got there?

A. They took a X-ray and then they put me in a cast.

Q. Put your ankle in a cast? A. Yes, sir.

Q. Let me ask you this: did you have any trouble in any other part of your body as a result of the accident?

(Testimony of Fernando S. Forfari.)

A. I had trouble with my back when I fell down.

Q. Your back?

A. My back hurt all the time. [12]

Q. Did they take X-rays when you were in the hospital?

A. They don't take X-rays of my back, they take X-rays of my foot.

Q. No X-rays of your back, just your ankle, is that it?

A. Because I don't feel the back at that time; because of the heavy pain on my foot, I didn't feel the back at all.

Q. You were in the hospital three days?

A. I don't remember, three or four days, something like that.

Q. And they put a cast on your left ankle?

A. Yes.

Q. How far up your leg did the cast go?

A. Oh, about a foot and a half high, something like that.

Q. When you had the cast on were you able to walk with it? A. No.

Q. Were you in bed?

A. No, I got crutches.

Q. You were on crutches?

A. Yes, two crutches.

Q. Were you able to walk with the two crutches?

A. Yes, a little bit in the house. That is all I could do.

Q. How long would you say you were on those crutches?

(Testimony of Fernando S. Forfari.)

A. Oh, maybe about three months, I guess, something like that.

Q. And then you were able to get rid of the crutches? [13]

A. When I got rid of the crutches I got a cane. I use a cane because I was afraid to fall down. If I step on something, you know, I might go down, so I used the cane.

Q. How long did you have the cast on?

A. Oh, around about a month and a half or so, something like that.

Q. A month and a half or two?

A. About two months or more. I forget.

Q. How long did you use a cane?

A. Oh, I used a cane for quite a while.

Q. You used a cane for quite a while?

A. Yes.

Q. Do you use the cane now? A. No.

Q. You don't use the cane now?

A. No, I don't use the cane now.

Q. Do you still have trouble with your left ankle?

A. Oh yes, all the time. If I walk a little too much, you know, it will swell up and pain.

Q. The ankle swells up and you have pain?

A. Yes.

Q. Did you go back to work at any time, Mr. Forfari?

A. Well, the manager of the cafeteria, you see, he used to come down to the hospital, he was pretty nice with me, and then he came down and saw me

(Testimony of Fernando S. Forfari.)

in the house too. So if I recall right, [14] I think around the last part of June he called me, "Do you want to go back to work again?"

I said, "Sure, I work for you any time. I don't know if I can, but I will try."

He said, "All right." He said, "I will let you know." He said, "I am going to open up the central cafeteria." He said, "I want you to come over there and work there."

So I did. I worked over there, I don't know, about four weeks, something like that. And, you know, this fall bothered me a little bit in my foot all the time. But anyway, the cafeteria, the manager told me he is going to close up the cafeteria because we are not doing any business. And I said, "That is all right, I can't stand much longer myself to work any more."

Q. Did you have trouble with your ankle while you were working there at that time?

A. Well, it pained a little bit all the time, you know, because I have to stand up eight hours—seven hours, because we have got a hour to eat.

Q. Now, were you able to or did you do any work after that?

A. No, I never did any work.

Q. Have you done any work since?

A. Never worked since.

Q. Now, before this accident, Mr. Forfari, were you able to do your work without any pain or discomfort? [15]

(Testimony of Fernando S. Forfari.)

A. Well, I just worked in the house and that is all I can do.

Q. I think you misunderstood. Before the accident were you able to do your work as a chef?

A. Oh yes.

Q. Without any discomfort or pain?

A. Oh yes, sure.

Q. And did you have any pain in that left ankle before this accident? A. No.

Q. None whatsoever? A. No.

Q. Did you have any pain in your back before your accident? A. No.

Q. Now, getting back to the pain in your back, when did you first discover the pain in your back after the accident?

A. I discover that just as I left the hospital. I told the doctor. He said, "Why didn't you tell me before?"

I said, "Well, the pain I had in my ankle then, I didn't feel the back at all. In fact, when I have got one pain on one side I don't feel the other."

Q. Did he take any X-rays of your back?

A. No.

Q. Never did. How long did that pain continue?

A. Oh, it continued most of the time. [16]

Q. Most of the time?

A. Yes. It even pains now.

Q. It pains now?

A. If I walk or stand up too much, you know.

Q. Now, what about your ankle now? Do you have pain in that ankle now? A. Yes.

(Testimony of Fernando S. Forfari.)

Q. And are you able to walk normally as you did before this accident?

A. Well, no. If I walk on rough, you know, gravel, something like that, you know it is no good for me. You see, it pains then. If I strike something, you know, with my foot, then I go down.

Q. Does the condition of your ankle cause you to limp now? A. Yes.

Q. Did you limp before this accident? Did you limp before the accident?

A. No—I limped a little bit before, yes.

Q. You limped before this accident, didn't you?

A. Oh yes, but not much, not like now.

Q. Did you have an accident once before to your ankle? A. No.

Q. To your hip? A. To my hip, yes.

Q. An automobile accident? [17]

A. Yes. That is a long time ago.

Q. As a result of that automobile accident did you limp a little bit? A. Yes.

Q. Now, when you walk now, Mr. Forfari, you limp, is that because of the condition of your ankle?

A. Well, if I step down—for instance, if I step down a stair, see, I can't lift anything from the floor up, I go down.

Q. Now, all of your medical expenses, Mr. Forfari, were paid by your employer's insurance carrier, were they? A. Yes.

Q. The State Compensation Insurance Fund?

A. Yes, that is right.

Q. And you settled whatever differences you had

(Testimony of Fernando S. Forfari.)

in regard to a permanent disability with them for the sum of \$2500? A. Yes.

Q. And you received compensation during the time—— A. That is right.

Q. ——that you were temporarily disabled, is that correct? A. Yes.

Mr. Emmons: I have no further questions.

Cross Examination

Mr. Eddy: Q. Mr. Forfari—— A. Yes.

Q. ——do you remember what the staircase looked like in 1951? [18]

A. Yes, I remember.

Q. I want to show you a photograph and ask you to look at it and see if you can tell me what it is.

The Court: You have got it the wrong way.

A. I don't have my glasses. I don't know.

Mr. Eddy: Q. Do you have your glasses with you?

A. No, I don't have no glasses with me. I don't use the glasses, only to see to read and write.

Q. Do you have them in your pockets?

A. No, I don't have them at all.

Q. You can see these photographs, then, very well?

A. No, not very well, because I don't have my glasses.

The Court: Q. Do you wear glasses regularly, Mr. Forfari?

A. No—only when I write, yes. Sometimes I

(Testimony of Fernando S. Fortari.)

write without glasses, but if I read small type, you know, I can't make it out.

Q. What I am getting at is can you or can't you see that photograph?

A. Oh, I can see the photograph, yes, but not plainly.

Q. Can you see what it is?

A. Yes, yes.

The Court: Show it to him. I think he is just simply saying he couldn't see too well.

(The photograph was handed to the witness.)

The Court: That is supposed to be a picture of those [19] stairs. Do you recognize it, Mr. Fortari?

A. Yes, that is the steps, yes, that is right.

Mr. Eddy: Well, now, you will notice that there are some metal strips along the front of those stairs, is that right? Can you see metal strips there?

A. Metal strips there, yes, on the steps, right on the top there.

Q. Is that what you were referring to when you were talking a moment ago?

A. Yes, that is right.

Mr. Eddy: I will offer this as Plaintiff's Exhibit No. 1, your Honor.

Mr. Emmons: I have no objection.

The Court: I don't know whether Mr. Emmons wants you to offer any exhibits for him at this time.

Mr. Eddy: At this time?

The Court: You said you were going to offer it as a plaintiff's exhibit.

(Testimony of Fernando S. Forfari.)

Mr. Eddy: Excuse me, your Honor, defendant's exhibit.

The Court: Is there any objection, Mr. Emmons?

Mr. Emmons: No objection.

The Court: Let it be received and marked Defendant's Exhibit A.

(The photograph referred to was marked Defendant's Exhibit A.) [20]

Mr. Eddy: Q. It was your testimony it was about the second step from the top where you fell?

A. Yes.

Q. And you used those stairs every day while you worked there, didn't you? A. Yes.

Q. And you worked there about nine months?

A. I guess, something like that. I don't know.

Q. Now, on this day that you fell there wasn't any banana peel on the stairs, was there?

A. No.

Q. Or anything like that?

A. No, I didn't see it.

Q. You didn't see any foreign object like a roller skate or a banana peel?

A. No, I didn't see anything like that, no.

Q. The stairs were clean as far as you knew?

A. Well, I guess, yes.

Q. And there wasn't any foreign substance on the stairs, was there?

A. No, I don't notice. All I remember that metal there.

Q. The metal was there, yes, but I mean there was nothing——

(Testimony of Fernando S. Forfari.)

A. I don't remember the other, anything else, this far away. You know, it is five years ago.

Q. Yes. Well, now, this metal strip, as far as you know, [21] was tacked down, wasn't it? It wasn't loose?

A. Well, I suppose it was loose or something, because I stubbed my shoe there when I fell. It must be something.

Q. Well, you didn't see that it was loose, did you? A. No.

Q. Now, as a matter of fact this metal strip sticks up a little bit, doesn't it, above the level of the stair?

A. Maybe it was a little bit up, I suppose.

Q. But that is not more than about a 16th of an inch, is it?

A. I suppose so, I don't know. I never measured it.

Q. Just a very little bit?

A. A very little bit, yes.

Q. Yes. A. That is right.

Q. Now, I call your attention to the staircase here and to the room up above. Now, that was the locker room, wasn't it? Would you look at the picture, please? A. Yes.

Q. That is the locker room up there?

A. Yes, locker room.

Q. And the lavatory is off to one side, isn't it?

A. Yes, on the side, back there, yes.

Q. Well, is it not true that there is a light in

(Testimony of Fernando S. Forfari.)

the ceiling of the locker room that shines right down the stair? [22]

A. I didn't see any light then. If there was any light then it was on my back, because there was no light in the top there. Back here in the ceiling, I know at the top of the steps there was no light there.

Q. I don't mean in the stairwell, I mean in the room at the head of the stairs, isn't there a light that shines down the steps?

A. There was a couple of lights up there, I don't know; there is two, for sure.

Q. In the locker room?

A. Yes, in the locker room.

Q. Isn't it true that one of those lights is so situated that it shines down the stairs?

A. Maybe it is. I forget anyway.

Mr. Eddy: I call the Court's attention to the answers to the requests for admissions made in this case, questions number 23, 24, and 25 and 26.

Q. I believe, Mr. Forfari, that at the request of the government you answered some questions for us, and you described the staircase as being 38 inches wide. Is that about right? If you will look at that picture now, I am referring to the staircase, from side to side as being 38 inches wide. Is that about right?

A. Well, I don't remember. I measured it at the time, but I don't remember what it was. I don't remember, it was [23] too far away.

Q. Thirty-eight inches from side to side, is that

(Testimony of Fernando S. Forfari.)

about right? A. Maybe it was, I don't know.

Q. I beg your pardon?

A. I measured it there once after the accident, I went there and measured it.

Q. Now, you can actually reach out this way 38 inches, can't you, Mr. Forfari?

(Demonstrating.)

A. I might. I never tried. I don't know. I doubt if I can reach both sides.

Q. Now, you had never made any complaint to the club officer or to your employer about this staircase, had you, before the accident?

A. No.

Q. You never told anybody—excuse me.

A. I say I don't make no complaint, no. Of the steps, you mean?

Q. Yes.

A. No, I never make no complaint, no.

Q. Now you say you went back to work, was it in July, July 7th of 1952?

A. Yes, sometime in there.

Q. And you worked as a cook on Mare Island then, didn't you? A. That is right. [24]

Q. You were able to perform your work satisfactorily, weren't you?

A. Well, it was satisfactory most of the time that I know. The manager thought very highly about my work.

Q. They didn't tell you that you couldn't do the work when you were there? A. Oh, no.

Q. Now, this washroom or locker room was for

(Testimony of Fernando S. Forfari.)

the employees, wasn't it? A. Yes.

Q. There was another lavatory for the officers' use, wasn't there?

A. Oh, yes, there was an officers' lavatory, yes.

Q. I mean the members of the club had one that they used?

A. Oh, yes. I guess so; I don't know.

Q. But this was for the employees?

A. This was for the employees in the back, yes, in the back of the kitchen, yes.

Mr. Eddy: No further questions.

Mr. Emmons: May I see this photograph? Counsel, may it be stipulated that this photograph was taken——

Mr. Eddy: Very recently.

Mr. Emmons: ——on the 10th of this month?

Mr. Eddy: Yes. I didn't ask that question of this witness, but I believe that testimony will show that the stairs [25] are substantially in the same condition now as they were in 1951. I mean as far as this photograph. The photograph shows the stairs in practically the same condition as they were back in 1951.

Mr. Emmons: I have no further questions. You may step down.

The Court: Do you have another witness on this issue of liability?

Mr. Emmons: I have no other witness on liability, your Honor.

The Court: Do you have a witness on the question of liability, Mr. Eddy?

Mr. Eddy: I do, yes. I would like at least for the purpose of the record to interpose a motion at this time on the ground that there has been no showing of any defective or dangerous condition of the premises here and that there has been no showing of any notice to anyone of any defective or dangerous condition of the stairway.

The Court: I will take the motion under consideration and I will reserve ruling.

Mr. Eddy: All right, your Honor.

The Court: It is understood that I will allow you to proceed by way of defense on this question of liability and Mr. Emmons and his client are in no way precluded from presenting evidence on the question of damages if I rule that there is liability.

Mr. Eddy: So stipulated.

Mr. Emmons: Yes.

The Court: All right, so there will be no misunderstanding.

Mr. Eddy: Mr. Sexson.

DALE SEXSON

called for the defendant, sworn.

The Court: I think we should also have an understanding that you are proceeding on this issue without any prejudice to your motion that you have made and upon which I have reserved ruling.

Mr. Emmons: Certainly, your Honor.

The Court: Very well.

Direct Examination

Q. (By Mr. Eddy): Mr. Sexson, you have given us your name. What is your address, please?

(Testimony of Dale Sexson.)

A. Mare Island Naval Ship Yard.

Q. And are you employed there?

A. Yes, sir.

Q. Are you a naval personnel or civilian?

A. Civilian.

Q. At this time what are your duties, sir?

A. I am manager of the CPO Club.

Q. In 1951 did you have the same duties?

A. I was manager of the Commissioned Officers' Club.

Q. Where is the Commissioned Officers' Club, please? [27] A. On Mare Island.

Q. Is it a building that has a number or something?

A. Oh, it is 396, if I am not—396, I think.

Q. And when you were manager of the Commissioned Officers' Club, who paid your salary?

A. Out of club funds.

Q. And how long were you the manager of the club? A. Two years.

Q. Now, did the club have the occupancy of the building of the number you have just given us?

A. Yes.

Q. Was it the only occupant of that building?

A. Yes.

Q. How many employees, approximately? You may not be able to remember exactly, but about how many employees did they have?

A. The club itself, I would say, as I remember, about six.

Q. And what were their duties?

(Testimony of Dale Sexson.)

A. There were two in the accounting office, two in the main office and myself and a janitor.

Q. Now, who was eligible for membership in the club? Was that commissioned officers of the Navy?

A. That is correct.

Q. And they used the club, did they, from time to time? A. Yes. [28]

Q. And I suppose could bring in guests, couldn't they? A. Bona fide guests, yes.

Q. Members of the public, were they permitted to use the facilities of the club?

A. Only as guests.

Q. The public wasn't permitted to come in except as guests of members of the club?

A. That is correct.

Q. Now, did any other clubs occupy the premises while the Commissioned Officers' Club was there? A. No, no.

Q. Did the Navy use the club for any purposes other than as a Commissioned Officers' Club at the time? A. No, sir, just club affairs.

Q. There was no ammunition stored there and no guns were fired and no drills were had or anything like that? A. No, sir, purely social.

Q. Now, do you know who was the owner of the building there? A. The United States Navy.

Q. I guess the Navy is the owner of all the property on Mare Island, is that right?

A. Yes, sir.

Q. And Mare Island is a military entity, is it not? A. That is correct.

(Testimony of Dale Sexson.)

Q. You have to have a pass to get in? [29]

A. That is correct.

Q. Now, is the Commissioned Officers' Club some kind of a instrumentality of the United States, did you know? A. Yes, sir.

Mr. Emmons: Just a minute, if the Court please, I will object on the ground it calls for a conclusion of this witness.

The Court: The objection will be sustained. The answer is stricken.

Q. (By Mr. Eddy): Well, is the club an organization of any kind? Was it organized?

A. Oh, yes sir.

Q. Was it organized pursuant to naval regulations?

A. Directly from the Department of Defense.

Q. Did it have a governing board?

A. Yes, sir.

Q. And who was on the board, did you know?

A. You say governing board? It was an advisory board, and a representative—an effort was made to have a representative from each command on the yard to promote the right interest in the club.

Q. Now, who appointed the advisory board?

A. The shipyard commander.

Q. He is a Navy Officer, is he not?

A. Yes, sir; Admiral.

Q. Now, what arrangement, if any, did the Commissioned [30] Officers' Club have with the Navy

(Testimony of Dale Sexson.)

itself as far as the use of this building is concerned?

A. Well, the same as any other activity, with this exception: there was no money appropriated for the operation of the place. It was—we called them non-appropriated monies and operate self-sustaining.

Q. Well, did the Commissioned Officers' Club pay any rent to the Navy for the use of this building?

A. No, no sir.

Q. Did the Commissioned Officers' Club have any money of its own?

A. Yes.

Q. What was the source of its money?

A. The different activities promoted within itself. For example, maybe, parties—it was non profit, make enough to pay for the expenses and refreshments.

Q. Now——

Q. (By the Court): In other words, the club got its revenue from its own activities, then?

A. That is correct.

Q. Was any membership fee charged?

A. No, no membership fee.

Q. You had to make it on the operation of the concern itself?

A. That is correct. [31]

The Court: All right.

Q. (By Mr. Eddy): Now, if any repairs were necessary to this building, how was the repair handled?

A. Notification to Public Works that keep all buildings up in good repair.

(Testimony of Dale Sexson.)

Q. Well, Public Works was a direct function of the United States Navy, is that right?

A. That is correct.

Q. And Public Works would make the repair?

A. That is correct.

Q. How would Public Works know that any repair was necessary?

A. By either a telephone call if it was a small job, or any major work to be done, through the advisory group, through the shipyard commander, and it would be started in that manner.

Q. While you were employed there did you spend your working hours in the club itself?

A. Yes, sir.

Q. Did your duties include—what did they include?

A. Well, the operation of each activity, each party, supervision of the club-rooms, examining of the furniture, if any painting needed to be done; by daily observation, casting an eagle eye around the rooms.

Q. It was within the scope of your duties, then, to look for repairs? A. Yes. [32]

Q. Now, I call your attention to Defendant's Exhibit A and ask you if you recognize that?

A. Yes, sir.

Q. What is it, please?

A. That is the stairway leading from the hallway to the rear of the galley, to the men's locker room.

(Testimony of Dale Sexson.)

Q. Did you have occasion to see that stairway in 1951? A. Oh yes; daily.

Q. Did you have occasion to see it on or around November 21, of 1951?

A. I am quite sure I did. I can't pinpoint it down, but there is hardly a day that I didn't make inspections through for cleanliness and so forth.

Q. Did you ever observe anything in disrepair as far as those stairs were concerned?

A. No, no.

Q. Did you ever receive any reports that those stairs were dangerous or defective in any way?

A. No, no.

Q. Referring to Defendant's Exhibit A, does that picture show that staircase in substantially the same condition it was in 1951?

A. It looks exactly the same.

Q. I call your attention to some metal strips which appear in the photograph to be along the front of the stairs. Do you [33] notice them?

A. Yes, sir.

Q. At my request did you make any measurements or did you closely examine those metal strips? A. Yes, sir.

Q. Do they stand above the level of the staircase in any way?

A. Just the thickness of a very thin piece of metal. I would say not more than a 16th of an inch, probably not that.

Q. How is the staircase lighted, Mr. Sexson?

A. In the locker room above, as I remember it,

(Testimony of Dale Sexson.)

there are two ceiling fixtures, one at one end of the room and one at the other. The light from the one just at the top of the stairway made the light for the stairway.

Q. Is it well lighted?

A. Yes, it always was.

Q. Who pays for the utilities that a club uses on those premises?

A. They are paid for out of the club funds, heat, lights, water and gas. They were at that time. I assume they are at the present time.

Q. That club is still in operation, is it not?

A. Yes, sir.

Q. But you are no longer the manager? You have been moved to some other job? [34]

A. That is right.

Q. The Commissioned Officers' Club carries liability insurance, does it not? A. Yes, sir.

Mr. Eddy: You may cross examine.

Cross Examination

Q. (By Mr. Emmons): Now, Mr. Sexson, from the photograph it is evident that there was no hand-rail on either side; that is correct, is it not?

A. That is correct.

Q. There never was one on there?

A. Pardon me?

Q. There never was one on there?

Mr. Eddy: I will object to that, your Honor, as what may have been the situation either before or after.

(Testimony of Dale Sexson.)

Q. (By Mr. Emmons): Well, was there one at the time of this accident, in November 1951?

A. Was there a handrail at the time of the accident? No.

Q. On either side? A. No.

Q. Now, you have mentioned that the club had six employees? A. That is approximately.

Q. Two men in the accounting, I think you said two men in the main office, yourself and a janitor. Weren't there any other employees? [35]

A. No. That was the regular club employees. That is just approximately. There may be one added or two added for a special party.

Q. Did you have a kitchen there?

A. Yes, there was a kitchen in the building.

Q. And when you gave parties was the kitchen used? A. The kitchen and dining room.

Q. It was used daily, wasn't it?

A. That is correct.

Q. By the officers? A. Yes, sir.

Q. And their guests? A. Yes.

Q. Where did you get the people who worked in the kitchen?

A. The club had a contract with the Mare Island Cafeteria System to furnish food for the club and the help and so forth. That was a yearly contract arrangement.

Q. This annual contract with the Mare Island Cafeteria System was just to provide all the necessary employees in the kitchen, is that right?

A. And food.

(Testimony of Dale Sexson.)

Q. And the food?

A. And the preparation of the food.

Q. And you had nothing to do with those employees and food? A. That is correct. [36]

Q. All you were interested in was having the food there and made available to the officers.

A. That is correct.

Q. And I take it, then, that you did not pay any of the employees who were in the kitchen, like the chef or any of the people who worked in the kitchen or dining room? A. That is correct.

Q. Is that contract in writing? A. Yes, sir.

Q. I want to ask you some questions about your exhibit A, the picture here, if I may. Now, this picture was made this month. In five years' time is it your testimony that there has not been any change in those stairs?

Mr. Eddy: I will object, your Honor. I don't believe that any changes made after the accident are admissible in this case.

The Court: No. The only purpose is to test the credibility of that photograph, I assume.

Mr. Emmons: Yes.

The Court: The objection is overruled.

Mr. Eddy: I believe the testimony, your Honor, was that the photograph shows it in practically the same condition as it was then.

The Court: Yes, and Mr. Emmons wants to know if it is his testimony that there has been no change in five years. [37] Proceed.

A. I wouldn't be able to say, since I left the

(Testimony of Dale Sexson.)

club in February of 1952. I know there were no changes up until the time I left.

Q. (By Mr. Emmons): I notice here on the stairs that there is evidently—you see those worn parts along the front of the stairs? That is linoleum, isn't it? A. Yes, sir.

Mr. Eddy: Well, your Honor, I don't think this makes much difference. I think that counsel is trying to show that there was a handrail placed on that at sometime since the accident.

Mr. Emmons: I am not discussing handrail.

The Court: He hasn't suggested that at all.

Mr. Eddy: That is what you are getting at, isn't it?

Mr. Emmons: No, I didn't even think about a handrail. I'm not even discussing it.

The Court: I think the evidence is admissible. Let it come in. He is talking about this photograph and what appears in the photograph at the present time.

Mr. Eddy: Well, the government will stipulate that a handrail was placed along the side there.

The Court: I am not interested in whether there were forty handrails put in there. He is asking about something that is in this photograph here. He mentioned the word [38] "linoleum." Now, I don't know what he is leading up to. Proceed, Mr. Emmons.

Q. (By Mr. Emmons): The linoleum there has been frayed and it is worn back beyond the position of this metal rise, hasn't it? A. May I—

(Testimony of Dale Sexson.)

Q. Doesn't it appear to be in there?

A. Well, it might appear to be in the photograph. However, I went up and looked at the steps yesterday to refresh my memory, and the linoleum is perfectly smooth, as smooth as it can be, no worn spots in it.

Q. Well, those right there in the photograph, those are worn spots, are they not, right in the front of each one of those steps?

A. No, no, it is just as smooth as this linoleum here.

Q. Here's the question I want to know: this metal strip along the front of each riser curves over the top of the step, does it not, so that it holds down the linoleum?

A. Yes, right over the edge of the step.

Q. And—— A. And that——

Q. Excuse me, go ahead.

A. And that, as I say, is enough to catch the linoleum.

Q. It would have to go back at least half an inch, would it not?

A. Well, it wasn't—I don't know yesterday just how far [39] back it did go, because the metal part went clear over to the wall on each side.

Q. Now, did you ever at anytime during the course of your inspection of this stair during the time that you were manager see anyone of these metal strips in disrepair? A. No.

Mr. Eddy: I will object, your Honor, as far as anything occurring after the accident. It certainly

(Testimony of Dale Sexson.)

makes no difference here. I think the question is too comprehensive.

The Court: The answer is "no," so it doesn't make any difference.

Mr. Eddy: I didn't hear it.

The Court: He said during the whole time he was there he never saw it in disrepair, so you don't need to worry about it.

Q. (By Mr. Emmons): Now, during the time you were manager had any of these metal strips been replaced?

A. No. I didn't find it necessary.

Q. Never had been replaced? A. No.

Q. Had the linoleum been replaced?

A. No. I didn't find that necessary either. It was used very little. It didn't get hard wear. The employees at the start of their shift, maybe a couple of times during their shift. [40]

Q. Well, I would say from the looks of the risers here, from the conditions of the risers as you marked, it would get substantial wear?

A. Well, over a period of time I imagine those do accumulate.

Q. Now, from the position of this photograph you are unable to see where that light you mentioned is located. Now, can you tell me so that I will know in my own mind where that light is located?

A. It is right up here in the ceiling.

(Indicating.)

(Testimony of Dale Sexson.)

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A. It is right up here in the ceiling.

(Indicating.)

(Testimony of Dale Sexson.)

Q. Is it in the middle of the room back here or to the right?

(Indicating.)

A. No, I would say it is right here.

Q. Would you put a little mark where you have made that indication on Defendant's Exhibit A?

A. (The witness marked on photograph.) I would judge right about there. In other words, I noted yesterday it wasn't right square in the center of the staircase but just to the—it covered it with light.

Mr. Emmons: I think that is all. I have no further questions.

Mr. Eddy: Your Honor, I would like at this time—I think it might be appropriate to put in evidence this regulation under which the messes are organized. It is something [41] of which the Court can take judicial notice.

Mr. Emmons: What mess?

Mr. Eddy: It is Naval regulations.

Mr. Emmons: What mess?

Mr. Eddy: The Commissioned Officers' Club.

Mr. Emmons: Well, if your Honor please, I don't think it is material actually, because by the admission of this man the plaintiff in this case was not employed by the Commissioned Officers' Club, but was employed by the Mare Island Cafeteria System, which was, by his own admission, an independent contractor.

Mr. Eddy: Well, that is quite true, but——

The Court: Well, I don't know what the legal

aspects are right at this moment, but I think this may be of some concern to us.

Mr. Emmons: Could be. I have no objection.

The Court: So I am going to admit it as Defendant's Exhibit B.

Mr. Eddy: Very well.

The Court: Is it something I can take judicial notice of anyway.

Mr. Emmons: Very well.

(The document referred to was marked Defendant's Exhibit B.)

The Court: Do you have any more questions of Mr. Sexson, Mr. Eddy? [42]

Mr. Eddy: No, your Honor.

The Court: All right, step down. We will take the morning recess at this time.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. Eddy: The government will call Mr. Will Hall. Will you be sworn, please, Mr. Hall?

WILL HALL

called for the government, sworn.

The Clerk: And your name, please?

A. Will Hall.

Direct Examination

Q. (By Mr. Eddy): You have given us your name, Mr. Hall. What is your address, please?

A. 509 - 3rd Street.

Q. Vallejo? A. Yes sir.

Q. And what is your occupation, please?

(Testimony of Will Hall.)

A. Janitor work.

Q. And where do you work?

A. I work at the CPO Club now.

Q. Did you work on the Mare Island Navy Shipyard in 1951? A. Yes.

Q. Where did you work?

A. I worked in the officers' club. [43]

Q. I call your attention to Defendant's Exhibit A, a photograph, and ask you if you know what it represents there?

A. It is a step up to the dressing room we use.

Q. Now, did you have occasion to clean those stairs in the course of your duties?

A. Yes, sir, I cleaned them every day.

Q. And were you there in the month of November of 1951? A. Yes, sir.

Q. Was it a part of your duties to observe whether or not the premises needed repair?

A. Yes sir.

Q. And what would you do if you found some of the premises that needed repair?

A. Tell Mr. Sexson.

Q. You would report that to Mr. Sexson?

A. Yes, sir.

Q. Now, did you ever notice any needed repairs on this staircase? A. No sir, never did.

Q. Did you know Mr. Forfari, who is the plaintiff in this case? A. Yes sir.

Q. Did he ever make any report to you that he considered this staircase to be dangerous?

A. No sir. [44]

(Testimony of Will Hall.)

Q. Did anybody say that? A. No.

Q. Did you ever make any report to Mr. Sexson that you considered the staircase to be dangerous?

A. No sir.

Q. How was that staircase lighted?

A. It was lighted at the top—there were four or five lights in the hall and the dressing room, there was about four or five lights there, and one right at the doorway as you come up there.

Q. Was there a light at the top of the stairs that would shine down the stairs?

A. Yes, right on the corner.

Q. Calling your attention to the photograph, I see there is a door in the foreground of that photograph on the right hand side. Where did that door go to from the staircase?

A. As you go up there is a hallway there.

Q. Well now, if you will look at Defendant's Exhibit A you see a large door—you can't see the top of it—on the right-hand side of the photograph in your hand? A. Yes.

Q. What is on the near side of that door, on the downstairs side of that door?

A. On the near side?

Q. Well, is there a hall in there? [45]

A. Yes, there is a long hall that goes there.

Q. Were there any lights in that hall?

A. Yes.

Q. Where were they?

A. Up in the ceiling.

(Testimony of Will Hall.)

Q. Was there any light in that hall that would shine on the stairs?

A. Yes, there was one light there at the door.

Q. There was one light there at the door?

A. Yes. I would unlock the door to go up there every morning.

Q. Do you remember the occasion when Mr. Forfari was hurt? A. Yes sir.

Q. Were you working at the club at that time?

A. Yes sir.

Q. Did you make any examination of the staircase after he fell? A. No, I didn't.

Q. Had you seen it during that day?

A. Oh, yes, I lived up there.

Q. Did you live up there at that time?

A. Yes.

Q. Where was your room?

A. Right there next to the main rest room there.

Q. I see. Did you have occasion to look at the stairs [46] after he fell?

A. Yes, going back and forth up there.

Q. Did you see anything wrong with the stairs at that time? A. No, sir, I didn't.

Mr. Eddy: You may cross examine.

Cross Examination

Q. (By Mr. Emmons): You were employed by the Commissioned Officers' Club, were you not?

A. Part time, yes. When I first started to work there I was and then I went to the yard payroll.

Q. In any event, at the time Mr. Forfari was

(Testimony of Will Hall.)

hurt that was your employer, was it, the Commissioned Officers'?

A. Yes, I was working there, but I was paid from the Navy yard.

Q. Were you paid by the Navy? A. Yes.

Q. Were you a civil service employee?

A. Yes.

Q. Mr. Sexson was your boss? A. Yes.

Q. At the time of the accident what made you aware that something had happened?

A. Somebody hollered, you know, he hollered back there for somebody to come and pick him up.

Q. Where were you? [47]

A. Right there in front cleaning up, then we all went back there.

Q. Who did you mean by all? Were there some others around there?

A. There was a couple of guys in and out. They weren't working at the time it happened.

Q. What did you do?

A. Well, I helped him up in a chair.

Q. Where was he when you first saw him?

A. Where did I see him? They had put him in a chair when I went back there.

Q. Where was Mr. Forfari when you first saw him after you heard this scream?

The Court: He said they had put him in a chair.

A. They had put him in a chair.

Mr. Eddy: I am going to object to this line of testimony, merely for the record. This is his witness, I think he should ask direct questions as to

(Testimony of Will Hall.)

this line of testimony. I have no objection to him asking these questions, but I believe he should be——

The Court: No, I believe the circumstances surrounding this he is entitled to go into. You asked him if he knew when he fell, so he is entitled to go into all the circumstances. Proceed.

Q. (By Mr. Emmons): You weren't at the bottom of the stairs [48] when it happened?

A. No.

Q. You didn't see it happen? A. No.

Q. You heard somebody scream? A. Yes.

Q. Then did you go over to the bottom of the stairs? A. No, I was back in the club.

Q. You saw two men helping Mr. Forfari?

A. Putting him in a chair, he was sitting in a chair by the door there.

Q. There was a chair there by the door?

A. Yes.

Q. In the hall or in the stairway?

A. In the hall.

Q. And you learned then that he had fallen down the stairs? A. Yes.

Q. Could you see whether he had been hurt in any way? A. No, I couldn't see.

Q. Nothing that you could observe?

A. No.

Q. Did he tell you at that time he had hurt himself any way?

A. No, he didn't say anything.

Mr. Eddy: I object to the self-serving statement, your Honor. [49]

(Testimony of Will Hall.)

The Court: The objection will be sustained. Don't answer that, Mr. Hall.

Q. (By Mr. Emmons): Mr. Hall, did those stairs always have linoleum cover on the risers?

A. You mean on each one of the steps?

Q. Yes. A. Yes.

Q. It had linoleum? A. Yes.

Q. And it had this metal strip across it?

A. Yes.

Q. And that is what held the linoleum down, is that right? A. Yes.

Q. Were they worn at all across the front part of the step while you worked there?

A. No, I don't think so.

Q. Did they look worn? A. No.

Q. They looked fresh, did they?

A. Not too fresh, but——

Q. How long did you work there?

A. I worked there about four years.

Q. And had there been any repairs to the stairs while you were there?

A. Nothing but painting. They painted the hallway. [50]

Q. And it was a part of your job, was it, to notice defects?

A. It was all my job. I lived there. I had to keep that up.

Q. You see this metal strip across here in Defendant's Exhibit A, this picture? Was that the type of metal strip that was on there about that time when Mr. Forfari fell?

(Testimony of Will Hall.)

A. There was a metal strip across there. I don't know anything about any change. That is metal across there.

Mr. Emmons: I have no further questions.

Mr. Eddy: No further questions.

The Court: All right, Mr. Hall, you may step down.

Mr. Emmons: Oh, I have one more. I forgot about the light. May I ask one more question about the light?

The Court: Yes, you may.

Q. (By Mr. Emmons): Now, you mentioned there was a light at the top of the stairs. Will you put an X where you think the light on this Defendant's Exhibit A would be, just about the position where the light was, if you can?

Mr. Eddy: Your Honor, I am going to object to that. I don't see that there is anything——

A. It is about there (indicating).

Mr. Eddy: Just a minute.

Mr. Emmons: Just a minute. There is an objection.

The Court: Can you show us on that picture where the light was, Mr. Hall? [51]

A. No, you can't see the light in the hall. It is right on the right hand side of it. There is lights all the way across the picture.

Q. (By Mr. Emmons): You mean where that X is on the picture, that is about the position it would be?

A. Right along in there. When you open the

(Testimony of Will Hall.)

door a light shines upstairs and one shines down (indicating on photograph).

Mr. Emmons: All right, thank you. No further questions.

Mr. Eddy: The government will call Mr. Patmon.

FRANK PATMON

called for the government, sworn.

The Clerk: Your name, please?

A. Frank Patmon.

Direct Examination

Q. (By Mr. Eddy): You have given us your name, Mr. Patmon. What is your address, please?

A. 142 Los Altos, Vallejo.

Q. What is your occupation?

A. I am manager of the Mare Island Cafeteria System at Mare Island.

Q. How long have you been the manager?

A. 12 years.

Q. Now, was the plaintiff in this case—do you know the plaintiff in this case, Mr. Forfari?

A. Yes, I do. [52]

Q. Was he at one time employed by the Mare Island Cafeteria System?

A. Yes, he was.

Q. When was that, please?

A. He came in 1951, in May of 1951—no, I beg your pardon, February of 1951.

Q. And how long did he work?

A. Until August 29, 1952.

(Testimony of Frank Patmon.)

Q. Well now, I believe that you have knowledge of an accident that occurred on November 21 of 1951. Was he employed by the Mare Island Cafeteria System at that time? A. Yes.

Q. And was he then absent from work for some period of time? A. Yes, he was.

Q. Until when, please?

A. He came back to work in July of '52.

Q. And then how long did he work after that for the Mare Island Cafeteria System?

A. He worked until August of that year, August 29th.

Q. Was he able to perform his work satisfactorily in July of 1952?

A. Yes, he was satisfactory.

Q. Now, what is the purpose of the Mare Island Cafeteria System? [53]

A. We are authorized—

Mr. Emmons: Your Honor—just a minute, please—I will object on the ground that calls for conjecture or a conclusion of the witness, what the purpose is.

Mr. Eddy: Well, perhaps I will rephrase it and there will be no further objection.

Q. You have been, you say, with them for 12 years? A. Yes, sir.

Q. How long have you been the manager?

A. Ten years.

Q. You are a civilian, are you? A. Yes.

Q. Has it become necessary for you to become familiar with the functions of the Mare Island Caf-

(Testimony of Frank Patmon.)

eterial System since you have been manager over the last ten years? A. Yes.

Q. Do you know the services that it performs?

A. Yes, sir.

Q. And do you know the duties of the various members of its staff? A. Yes, I do.

Q. Is it organized pursuant to regulations issued by the Secretary of the Navy or Secretary of Defense? A. Yes.

Q. Are you familiar with the regulations under which it is [54] organized? A. Yes, I am.

Q. What function does the Mare Island Cafeteria System provide at the shipyard?

A. It provides food services for the shipyard employees.

Q. When you say food services do you mean the purchase, preparation and service of meals?

A. That is right.

Q. Does it operate in more than one place or in one place only?

A. No, it operates in a number of places.

Q. How many places? At this time?

A. Well, twelve units and special services as required from time to time.

Q. Now, did it have twelve units in 1951?

A. Yes, it had more than twelve. It had about fourteen at that time.

Q. Where are the units? Where are they generally?

A. Well, they are distributed up and down along the waterfront about two miles in length and wher-

(Testimony of Frank Patmon.)

ever there is a concentration of people we have a unit.

Q. Now, are these cafeterias, largely?

A. Four cafeterias and eight canteen food services.

Q. What is the difference between the cafeteria and the canteen food service? [55]

A. We think of a cafeteria as a large building giving complete food service, equipped with a dining room and all the facilities of a large restaurant, as opposed to a canteen where it is more of a package service, sandwich, beverage service.

Q. Is hot food served at the canteen services?

A. Not hot meals. They serve such things as chili and hot sandwiches and cold sandwiches, but not a hot plate lunch.

Q. (By the Court): Isn't the distinction, if I can bring this to a head, the cafeteria is where you sell them food and they eat it on the premises and the others are where they buy it and take it wherever they want to eat it?

A. That is correct.

Q. They don't provide any space for eating in the canteens?

A. We do in some cases.

Q. Well, you have some benches or something around, but do you have a regular table service there?

A. In about half of them we do, yes.

The Court: All right.

Q. (By Mr. Eddy): At any rate, how many kitchens do you have?

(Testimony of Frank Patmon.)

A. We have one in complete operation at the present time.

Q. And the food is trucked out or carried out of the kitchen to the other places where it is consumed or vended?

A. Yes. It is delivered by truck.

Q. Yes. And you are the general manager for that entire [56] system, is that correct?

A. That is right, yes.

Q. Who is your immediate superior?

A. I have a board of directors as an advisory board, a control board, and I also have a civilian employee who is a supervisor of special services in direct line of authority of the industrial relations department.

Q. Is he a civilian also?

A. He is a civilian.

Q. Is he a member of this advisory board?

A. Yes.

Q. And to whom does he report?

A. To the Industrial Relations Officer.

Q. And to whom does the Industrial Relations Officer report?

A. The shipyard commander.

Q. And he is a Rear Admiral, is that right?

A. Yes.

Q. Is the Industrial Relations Officer Naval personnel?

A. Yes; he is a commander in the Navy.

Q. But this supervisor of special services is a civilian?

A. Yes.

(Testimony of Frank Patmon.)

Q. And he is a member of this advisory board?

A. Yes.

Q. Who appoints the advisory board?

A. The shipyard commander. [57]

Q. Does the cafeteria system operate as a profit-making organization?

A. No, it is a nonprofit organization.

Q. And I suppose it makes a small administrative profit just to make sure it doesn't have a loss, though, isn't that right?

A. Yes, that is right.

Q. And if any of this small administrative profit accumulates, what is done with that?

A. It may be used for improved food service or reduced prices, or with the approval of the shipyard commander it can be used for welfare of the employees.

Q. You say the shipyard commander must approve the use of this fund? A. Yes.

Q. Now, your advisory board is appointed by the shipyard commander. Is its actions subject to veto by the shipyard commander?

A. Yes, sir.

Q. In 1951 were you operating in the Commissioned Officers' Mess? A. Yes.

Q. Had the Shipyard Cafeteria System continuously operated kitchens in the Commissioned Officers' Mess?

A. During the life of the contract with the Commissioned Officers' Mess. [58]

Q. During the life of the contract?

(Testimony of Frank Patmon.)

A. Yes.

Q. To your knowledge did the Commissioned Officers' Mess hire its own cooks and serve its own meals at any time?

A. Not during that time.

Q. How about at this time?

A. They are operating it themselves at this time.

Q. But, in 1951 it was your responsibility, is that right?

A. Yes, food services.

Q. And how was the food services handled at the Commissioned Officers' Mess? Was that food prepared elsewhere and trucked in, or was it prepared on the premises?

A. It was mostly prepared on the premises, the Commissioned Officers' Club.

Q. But there were some occasions where you prepared the food elsewhere and brought it in?

A. Yes, there were some items of ready cooked food, in some cases.

Q. But were the cooks and waiters your employees?

A. Yes.

Q. (By the Court): Who provided you with the initial supplies, your equipment?

A. At the officers' club?

Q. (By the Court): No, in the entire Mare Island Cafeteria System? [59]

A. The government provided the buildings and the permanent equipment. Permanent equipment is identified as permanent, things like dining room tables, ranges, heavy equipment, stationary equip-

(Testimony of Frank Patmon.)

ment. Most of the portable equipment was purchased by cafeteria funds.

Q. In the event of discontinuance of this system, though, that is, dissolution of the organization, do you know what would become of the funds of the organization?

A. It would go into the general funds of the United States.

Q. Of the United States?

A. Yes, U. S. Treasury.

Mr. Eddy: Your Honor, I have another regulation, Navy Civilian Personnel Instructions, that has to do with the organization of this entity.

The Court: It is an official document?

Mr. Eddy: Yes, your Honor. It is something of which the Court can take judicial notice.

The Court: Let Mr. Emmons see it.

(The document was handed to Mr. Emmons.)

Mr. Emmons: I have no objection.

The Court: Let it be received and marked Defendant's Exhibit C.

(The document referred to was marked Defendant's Exhibit C.)

Q. (By Mr. Eddy): Pursuant to regulations, the Mare Island Cafeteria System had a contract for compensation insurance with [60] the State Compensation Insurance Fund, is that right?

A. That is right.

Q. And it was through that insurance policy that your employee, Mr. Forfari, was given compensation in this matter?

A. Yes.

(Testimony of Frank Patmon.)

Q. Did you have occasion to go into the kitchen of the Commissioned Officers' Mess and the employees' washroom during November of 1951?

A. Yes.

Q. And was that in connection with your duties?

A. That is right.

Q. Calling your attention to Defendant's Exhibit A I will ask you if you recognize it?

A. Yes.

Q. Did you use those stairs on occasion during that time? A. On occasion, yes.

Q. Did you ever notice anything defective or dangerous about them? A. No.

Q. Did anyone ever make a report to you that they considered them to be defective or dangerous?

A. No.

Q. Specifically, did your employee, Mr. Forfari, ever complain of the condition of those stairs?

A. No. [61]

Q. I believe there has been testimony that Mr. Forfari was receiving a salary of \$350 a month, is that correct? A. Yes.

Q. Just another question. The manner in which these services were performed were under your supervision, as I understand, as a civilian employee, is that right? A. Yes.

Q. Now, did the shipyard commander—he was a Navy officer, was he? A. Yes.

Q. And he is a rear admiral at this time?

A. Yes.

Q. Did he have the right to direct you to alter

(Testimony of Frank Patmon.)

the manner in which the services were performed or to discontinue them altogether?

A. He had that right.

Mr. Eddy: Thank you. You may cross examine.

Cross Examination

Q. (By Mr. Emmons): Mr. Patmon, you had a contract with the Commissioned Officers' Mess?

A. Yes.

Q. What was the nature of that contract?

A. It was to provide food services as required for the Commissioned Officers' Mess on a continuous day to day basis for an indefinite period. [62]

Q. Was that an annual contract entered into?

A. It had a cancellation clause, a thirty day cancellation clause, but it didn't have a term.

Q. Did it have anything in the contract at all pertaining to employees, the type of employees, whether they would be civil service or otherwise?

A. It didn't mention civil service. It didn't mention employees in that manner. We are not permitted to hire civil service employees.

Q. You cannot hire employees who come under the federal employees' compensation act, can you?

A. Will you state the question again?

(Question read.)

A. If I may clarify that, our employees cannot be civil service in our service. The fact that they are civil service for the government does not eliminate them from our employ.

(Testimony of Frank Patmon.)

Q. Didn't you just say that you couldn't hire that type of employees?

A. That is what I said, but the way the question was phrased lead me to believe you wanted to know whether my employees were civil service. We do not have civil service employees. I misunderstood the question.

Q. But, can you hire civil service employees?

A. The fact they are civil service doesn't concern us. They are permitted to work. [63]

Q. They could work for the Mare Island Cafeteria System?

A. That is right. Only they are not employed by the government.

The Court: What you are saying is that the mere fact a person is employed by you will not place them under civil service, but if they happen to be under civil service there was no reason why you couldn't employ them, if they are employable by you?

A. That is correct.

Q. (By Mr. Emmons): When you employ them they then lose their civil service status?

A. They do not.

Q. They do not?

A. That is true. If they work for the government and they work for me during their off duty hours that doesn't interfere with their civil service status with the government.

Q. I am not talking about off duty employees. I am talking about full time employees, such as Mr.

(Testimony of Frank Patmon.)

Forfari. If he were a civil service employee and went to work for you he would lose that status, would he not?

Mr. Eddy: If your Honor please, I object to that——

The Court: I don't know what he is getting at on this point. I think I have the situation pretty well in mind. Employees of this organization, whatever you want to call it, are not civil service employees; but if they happened to pick [64] up a civil service employee and use him, that doesn't jeopardize his rights as a civil service employee, if he can maintain it wherever he has civil service rights, but it doesn't deprive him of the right to work for him.

A. That is true.

The Court: There are a lot of those fellows down there who are working two shifts. They work over at the ship yard on the swing shift and then they come over and work some where else.

A. That is right.

The Court: All Mr. Patmon was saying was that just because a man was a civil service employee didn't keep him from employing him if he could use him.

Am I right on that or am I wrong?

A. That is right.

Mr. Emmons: But, my point is suppose a man only had one job, and this was the job.

The Court: Well, that is why I said it doesn't make any difference, because the civil service doesn't enter into it in this service here at all. We

(Testimony of Frank Patmon.)

are talking about things now that are hypothetical or perhaps academic.

Mr. Emmons: All right, your Honor.

Q. Do you have a copy of that contract? Do you have a copy of the contract?

Mr. Eddy: No, I don't have it here. I will be glad to provide it, however. [65]

Mr. Emmons: I would like to put it in the record.

Mr. Eddy: If it is still in existence. I haven't asked Mr. Patmon. Will you ask him?

Mr. Emmons: Is that contract still in existence?

A. Yes, counsel; I have a copy.

Q. Do you have a copy? A. Yes.

Mr. Eddy: You don't have it with you, do you?

A. Yes.

Mr. Eddy: Oh, do you?

Mr. Emmons: May we have the copy now, please?

The Court: Which contract are you talking about, the contract with the officers' club?

Mr. Emmons: Yes, with the officers' club.

(The document was produced.)

Mr. Emmons: We will offer this, if your Honor please, on behalf of the plaintiff as next in order, that contract.

The Court: That is your first exhibit. Let that be marked Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Emmons): You mentioned that the

(Testimony of Frank Patmon.)

initial supplies and the equipment that were obtained by this cafeteria service was obtained from the Navy. That is the building and the permanent equipment. [66] A. Yes, sir.

Q. All other equipment you purchased from the profits of the organization?

A. Not all of them, most other equipment.

Q. What other was there that you didn't get from the profits?

A. There might be money provided for certain things. For example, an additional bake oven or an additional mixture or slicer on occasions.

Q. Where did you get that?

A. I beg your pardon?

Q. Who provided that?

A. The government provides such things when the money is available.

Q. Mr. Patmon, I will show you here a copy of the state compensation insurance fund contract of insurance, workmen's compensation insurance, and ask you if you recall this and if that is a true and correct copy of the insurance at the time of Mr. Forfari's injury?

A. It seems to be. I don't recognize it as an individual document, but it seems to be, yes.

Q. That is the type of contract you had at that time? A. Yes.

Q. Now, with particular attention to this endorsement that is on there, do you recall that endorsement? A. Yes, I do. [67]

Q. At that particular time there was some ques-

(Testimony of Frank Patmon.)

tion as to whether or not the employees hired by you were federal employees or state, is that correct?

A. No, there wasn't a question. We were never considered state employees—well—we came under the state compensation law, but we were always more or less government employees.

Q. You mean you came under the state workmen's compensation act of the state of California, but you were still government employees?

Mr. Eddy: I am going to object as argumentative and actually this is right at the heart of one of the government's contentions here.

The Court: I will sustain the objection on the ground it calls for a conclusion of this witness on a legal question.

Q. (By Mr. Emmons): But, nevertheless, this endorsement was a part of the contract of insurance which you took out with the State Compensation Insurance Fund, is that correct?

A. Yes, that is right.

Mr. Emmons: May I offer this in evidence, if your Honor please,——

Mr. Eddy: May I see that again?

Mr. Emmons: ——as plaintiff's exhibit next in order?

Mr. Eddy: Just a moment.

Mr. Emmons: I will give you a copy of it.

Q. (By the Court): There isn't any doubt in your mind that that or a similar policy to that was in effect at the time of this [68] accident, is that right, Mr. Patmon?

(Testimony of Frank Patmon.)

A. There is no doubt.

The Court: I am going to admit it in evidence as Plaintiff's Exhibit 2 for what value it may have.

It is the hour of noon. We will take a recess at this time to the hour of 2:00 p.m.

Now, are you going to have any more witnesses, Mr. Eddy?

Mr. Eddy: Well, may I go back one paragraph and interpose an objection to this document?

The Court: Well, I don't know if it is worth anything, but I am going to let it come in for what it is worth and then I will take it into consideration. No harm can be done by it, and if there is any good can come from there they are entitled to have it. At the moment I don't know what can come from it, but it is up to them to show me.

Mr. Eddy: Do you have a copy for me, you say?

Mr. Emmons: Yes.

The Court: How about your evidence, Mr. Eddy?

Mr. Eddy: This is my last witness and I don't think I have any more questions to ask him.

The Court: What about you? Do you have any more evidence?

Mr. Emmons: No, your Honor.

The Court: Well, then, we will take the adjournment till 2:00 o'clock, and I want you gentlemen to get yourselves oriented so you can argue when you complete the evidence, and [69] then we will have the matter ready for submission on this stage of the case.

Mr. Emmons: Yes.

The Court: All right, that will be the order.

(Thereupon an adjournment was taken until
2:00 p.m. this date.) [70]

Afternoon Session

Wednesday, October 24, 1956, 2 p.m.

The Court: I believe, Mr. Patmon, you were on the stand at the time of the recess.

Mr. Eddy: I don't have any further questions, your Honor.

The Court: I thought you had more questions?

Mr. Eddy: No, your Honor.

The Court: You said you had no more.

Mr. Emmons: No, I have no further questions.

The Court: Then I was mistaken. You are through your cross examination?

Mr. Emmons: Yes.

The Court: Is the testimony on this phase of the case in, then?

Mr. Emmons: Yes, your Honor, as far as I am concerned.

Mr. Eddy: No rebuttal, your Honor.

(Testimony closed on issue of liability.) [71]

Friday, September 13, 1957, 10 a.m.

The Clerk: Case No. 6772, Forfari v. U. S., further trial.

Mr. Emmons: Ready, your Honor.

Mr. Woodward: Ready, your Honor.

The Court: You may proceed.

Mr. Emmons: Doctor Silbermann, will you take the stand.

DR. COLMAN SILBERMANN

called for the plaintiff, sworn.

The Clerk: State your name, please.

A. Colman Silbermann.

Direct Examination

Q. (By Mr. Emmons): Doctor, will you state your full name for the record, please?

A. Colman Silbermann.

Q. And where do you reside, Doctor?

A. 1280 Pine Street, San Francisco.

Q. And what is your business or profession, please?

A. Physician and surgeon.

Q. And where is your office located?

A. 995 Market Street, San Francisco.

Q. And are you licensed to practice medicine in the State of California? [72]

A. Yes, sir.

Q. And how long have you been so licensed?

A. Since 1914.

Q. And what——

Mr. Woodward: If the Court please, we will stipulate to the doctor's usual qualifications.

Mr. Emmons: Thank you.

The Court: Very well.

Q. (By Mr. Emmons): Now, Dr. Silbermann, you know Mr. Forfari professionally, do you?

A. Yes, sir.

Q. And will you tell us when you first saw him?

A. I first saw him in my office on June 19, 1952.

Q. And on that occasion did you examine Mr. Forfari?

A. I took a history from him and examined him.

(Testimony of Dr. Colman Silbermann.)

Q. And will you tell us at this time what the history was and what your examination revealed.

A. He was injured on November 21, 1951, and, briefly, he tripped on a metal step tread and fell about nine steps, landing on his back and twisting his left ankle.

There was no head injury, he was not unconscious. There was immediate severe pain in the left ankle, with some pain, which was not too severe at that time, in the lower back.

He was helped up by other employees and taken to the dispensary at Mare Island. [73]

X-rays of the left ankle showed a fracture.

He was moved to the Vallejo General Hospital by ambulance where he came under the care of Dr. Hoops.

A plaster of paris cast was applied extending from the toes to below the knee, without anesthetic.

He was in the hospital four days. He was on crutches for about four and a half months. The cast was worn for about six weeks and was replaced by a second cast with a walking iron which he wore for about four weeks.

He was in bed at home for about a month after he left the hospital, except for visits to Dr. Hoops' office about once a week, while wearing the cast.

After that he received diathermy treatment twice a week to the ankle and some diathermy treatment to his back.

The back was painful after he was injured and it

(Testimony of Dr. Colman Silbermann.)

bothered him increasingly and became worse about two months after he was injured.

The Court: Doctor, I missed something. You said he was in the hospital four days and something four and a half weeks. I missed that.

A. Four and a half months, your Honor.

Q. Four and a half——

A. He was on crutches four and a half months.

Q. On crutches. I am sorry. Thank you.

A. He was examined by Dr. Terwilliger — this was in [74] connection with his compensation injury, he was injured at work, but he was not treated by him.

At the time that I saw him, which was June 19, 1952, about eight months from the date of injury, he had not yet returned to work. His reasons that he gave me were that he had to stand, prolonged standing for 48 hours a week and he didn't think he could do it.

At that time he was 75 years of age.

Going into his previous history, he fractured his left hip and pelvis some thirty years before in an automobile accident. Thereafter the hip has been stiff.

Twelve years previous to the date of my examination a right inguinal hernia was repaired.

There was no history of other disability.

At the time that I saw him first he complained of pain, stiffness and swelling of the left ankle, worse on much weight bearing. The pain varied from dull aching to sharp, according to his activities. It was

(Testimony of Dr. Colman Silbermann.)

on the other side of the ankle, often extending up the leg into the knee.

He further complained of pain, stiffness and weakness of the back. The pain was constant, and also varied from dull aching to sharp, depending on his activities, and was in the middle and on each side of the lower back. It is worse on coughing and sneezing and in cold and damp weather, and other activities, such as bending, twisting and stooping or in [75] walking or lifting. Prolonged walking or standing also aggravated the ankle pain.

He said he had occasional pain in the knees.

There was no radiation of pain into the lower limbs from the back. He merely complained of weakness of the back and increasing pain on lifting, which he avoided as much as possible.

Sleep is often disturbed by pain in the back and left ankle. On arising his back felt about the same as on retiring.

I made a complete examination at this time. He is a small, cooperative, intelligent individual; I did not think he looked his age. Height, five feet four; weight, 138 pounds.

The general examination presented no abnormalities. His pupils were equal and reacted O.K. to light and distance.

The teeth were in poor condition; uppers replaced by a denture.

Tonsils small and buried. Heart and lungs clear. Blood-pressure, 150 over 95.

Abdomen negative.

(Testimony of Dr. Colman Silbermann.)

He walks without a cane and wears no support to his back or to the left lower limb. He walks with a left-sided limp with or without his shoes on, and there is an obvious shortening of the left lower limb from the pre-existing hip fracture.

He stands in poor posture; there is more weight carried [76] on the right lower limb than on the left.

There is a moderate upper dorsal kyphosis, curvature, there is a lateral curvature, convex to the right and reversed in the lumbar region. No muscle spasm noted at that time.

Palpitation over the lumbosacral articulation and the adjacent muscles on each side caused pain.

Forward bending is done slowly, with complaint of low back pain, with his fingertips eight inches from the floor.

He regained the erect position fairly readily and complained of less pain than in forward bending.

Extension, lateral bending and rotation to right and left are all painful and restricted about 25 per cent. There is no motion in the left hip, which is held flexed at an angle of 35 degrees.

He was unable to squat or kneel.

The Achilles reflexes were sluggish. Other reflexes equal and active.

The left foot, ankle and lower half of the leg were moderately swollen. There were moderate varicose veins in both legs. Alignment of the left leg was O.K. Palpitation caused complaint of pain on the outer side of the left ankle.

(Testimony of Dr. Colman Silbermann.)

Both feet were moderately pronated or flattened, normal in color, equally warm. Arterial pulsation felt in both feet. No crepitus in the ankles. [77]

He was unable to rock from heel to toes and back completely and without pain.

I made a series of comparative measurements of both legs and ankles:

Circumference of thigh six inches above patella, the knee-cap: On the right side 18 inches, on the left side $16\frac{1}{2}$.

Circumference of leg six inches below the knee-cap, $13\frac{1}{2}$ inches on the right, 14 on the left.

Circumference of the ankles, 10 inches on the right, $10\frac{1}{2}$ on the left.

Circumference of foot, $8\frac{3}{4}$ inches on the right, $9\frac{1}{4}$ on the left.

Dorsiflexion of the ankle, turning the ankle upward: 90 degrees on the right, 85 on the left.

Plantar flexion, or bending the ankle down, 50 degrees on the right, 50 degrees on the left.

Eversion, turning the ankle out, 15 degrees on the right, 10 on the left.

Inversion, turning the ankle in, 30 degrees on the right, 25 on the left.

The right lower limb was an inch and a quarter—I will put it the other way: the left lower limb was an inch and a quarter shorter than the right. The right measured $33\frac{1}{2}$ inches, and the left $32\frac{1}{4}$.

At the time that I examined him there were certain medical reports available in connection with his compensation that I reviewed, and I had X-ray

(Testimony of Dr. Colman Silbermann.)

films made in my office of both his back and his left ankle, which I have here.

The films of the lower back show fairly marked arthritic changes in the bodies of the lumbar vertebrae. No fracture. Some calcification of the abdominal aorta and pelvic vessels is noted. There is a healed, oblique fracture of the fibula, the outer bone of the leg, just above the ankle-joint, with some thickening of the bone, with the fragments of the fracture in good position.

Q. (By Mr. Emmons): What conclusion did you——

A. The conclusion that I arrived at was that the man had sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back, with findings at the time of my examination pertaining to the lumbosacral articulation and adjacent lower lumbar muscles bilaterally.

I did not believe he needed further treatment at that time, neither did I think his status was permanent or stationary at that time; it was too early.

I did not believe the old left hip fracture or arthritis are prolonging the disability. The fracture of the hip was 30 years old. These conditions pre-existed the date of the injury and did not prevent him from working.

Q. Now after that did you again see him on December 9, [9] 1955, Doctor?

A. No, that's the date of the report. November 29th.

Oh, I see, that's right.

(Testimony of Dr. Colman Silbermann.)

A. Yes, I did. I examined him in my office.

Q. And did you again examine him?

A. I took his interim history from when I had last seen him in June, '52.

Q. Will you tell us what that history was?

A. He told me that in July of '52 about a month after I had seen him he worked for four weeks as a chef, but had done no other work.

The Court: What was that date in '55 that you saw him, Doctor?

A. On November 29, your Honor, 1955. I hadn't seen him since the date of his examination.

He had worked four weeks as a chef and no other work.

In February 1954 he developed some urinary trouble—or, rather, he consulted Dr. Hebert of Vallejo. He had had some urinary trouble of long standing. In March of 1954 Dr. Hebert operated on his bladder under spinal anesthetic. He was in the Vallejo General Hospital for two weeks. He told me the operation did not help him.

In April of '55 a second bladder operation was performed under spinal anesthetic in Vallejo General Hospital by Dr. Hebert. He spent two weeks in the hospital again. Two herniae [80] on the left side were repaired and he said the second operation did help him.

He further gave a history of having had asthma for several years, usually appearing at night.

The left hip condition was not changed. He said it was stiff for about 30 years.

(Testimony of Dr. Colman Silbermann.)

Well, this is somewhat of a recapitulation of the history of the original one, because——

Q. Did he tell you at that time whether the condition of the lower back and left ankle had become better or worse?

A. As far as the ankle, he said his left ankle swells, feels weak and is painful. Motions are restricted. Pain and swelling are worse on much weight-bearing, again varying from dull aching to sharp according to his activities, and the pain is constant. It is on the outer side of the left ankle and extends up the leg into the knee.

Constant pain in the middle and on each side of the lower back, varying from dull aching to sharp according to his activities. Aggravated by the same conditions as before,—bending, twisting, lifting, cold and damp weather, coughing and sneezing.

He didn't know how much he could lift, because he avoided lifting, because his back felt weak and lifting aggravated the pain.

Sleep is often disturbed by pain in the back and ankle. [81] Feels about the same on arising as on retiring.

He gets up at night three or four times to urinate.

He was still seeing Doctors Hebert and Schmutz, who were the two doctors who operated on his bladder, and he saw them four or five days prior to my second examination.

I again re-examined him, and the general exam-

(Testimony of Dr. Colman Silbermann.)

ination presented no particular change. His blood-pressure was 145 over 95.

Q. Doctor, may I interrupt? The first time you examined him his weight was 138 pounds, I believe.

A. Yes.

Q. And on the second examination his weight was 119.

A. Yes, it had dropped to 119. I weighed him in the office. And his blood-pressure was roughly about the same, 145 over 95.

There was no abnormality of the neck, motions were painless and free. No deformity, no muscle spasm, no tenderness on palpation of the neck.

He had a healed 3½ inch linear scar in the lower abdomen, in the mid line, and a second one three inches in length parallel on the left side of the lower abdomen. These were the two scars of the operative procedure.

His reflexes were equal and active, except his Achilles' or heel reflexes were sluggish.

He walks without a cane, has a marked left-sided limp [82] with or without his shoes on.

Shortening was still noted in the left lower limb, due to the old hip fracture.

He has poor posture; carries more weight on the right lower limb than on the left.

The curvatures previously noted, the lateral curvature and the dorsal curvature or kyphosis, are still present.

No other abnormal bony prominences of the spine. No muscle spasm.

(Testimony of Dr. Colman Silbermann.)

Complained of pain on palpation over the lumbosacral articulation and adjacent lower lumbar muscles on each side.

He was able to forward bend to 10 inches this time as against eight on the previous examination. This motion was done slowly with complaint of low back pain. The erect position was recovered fairly readily and with less pain than in forward bending.

The other motions of the back,—extension, lateral bending and rotation to right and left, were painful and 25 per cent restricted.

The same flexion angle of the left hip of 35 degrees was noted, with no motion in the hip.

He was unable to kneel or squat. I had to help him remove and replace his shoes and socks.

The varicosities are still present in both legs. No restriction of muscle power in the lower limbs. [83]

Alignment of the left leg is good. There is a moderate swelling of the left foot, ankle, and lower half of the left leg, with pain on palpation over the outer side of the left ankle.

Arterial pulsation is felt in both feet. The feet are equally warm, normal in color, and moderately and equally pronated or flattened.

No crepitus in the ankles.

He was unable to rock from heel to toes and back completely with the left foot, or without complaint of pain.

I again checked his comparative measurements. On the right side, circumference of thigh six inches above the patella, $16\frac{3}{4}$ inches, the left $15\frac{1}{4}$ inches.

(Testimony of Dr. Colman Silbermann.)

Circumference of leg six inches below the patella, ten inches on the right, eleven on the left.

Circumference of the ankle, $9\frac{3}{4}$ on the right, 10 inches on the left.

Circumference of the foot, $8\frac{1}{2}$ inches on the right, $9\frac{3}{4}$ on the left.

Dorsiflexion of the ankle,—bending the ankle upward,—right 90 degrees, left 85.

Plantar flexion, downward, right 50 degrees, left 50.

Eversion,—turning the ankle out,—15 on the right, 10 on the left.

Inversion, or inward motion, 30 degrees on the right and [84] 25 on the left.

The same shortening of an inch and a quarter was noted of the left lower limb.

And I didn't have any more X-rays taken at that time.

My conclusion at that time was that the man had sustained an oblique fracture of the lower end of the left fibula and a sprain of the lower back November 21, 1951.

The findings at this examination pertain to the lumbosacral articulation and the lower lumbar muscles on each side. No further treatment was indicated. He is unable to work. His status from these injuries is permanent and stationary. The residual factors are pain in the lower back, increased on exertion, restriction of motions, weakness of the back, tenderness on palpation and presence of a back vulnerable to future trouble.

(Testimony of Dr. Colman Silbermann.)

As far as the ankle injury, the residual factors are pain and swelling, increased on much weight bearing, limited motions, and tenderness on palpation.

I made a comment about his non-industrial condition, which was a shortening of the left lower limb, some varicosities, absence of motion in the left hip, and urinary frequency and asthma unrelated to any accident. Some of the atrophy of the left lower limb I concluded could have resulted in part from the recent injury and some from the fracture 30 years before. [85]

Q. It is your conclusion and was at that time, Doctor, that this disability that he has is permanent and total?

A. Permanent and partial. He is not completely——

Q. Yes.

A. Permanent and partial. It is stationary, which is described as partial.

Q. Did you again examine this man at my request?

A. Yes, I examined him on August 28th of this year.

Q. He is now 81 years of age. Could you tell me whether or not there are any changes, any significant changes so far as his physical condition is concerned?

A. Subjectively, I went over his complaints, and subjectively I have a note here; his complaints have not varied particularly since I last examined

(Testimony of Dr. Colman Silbermann.)

him. In short, he says he has to be careful because of weakness in the left ankle not to fall, as the ankle tends to fold. Occasionally pain in his back and ankle keeps him awake at night. Does not believe he can lift over 15 pounds without increasing his back pain.

I re-examined him, and his condition is essentially about the same.

I have some more measurements. He weighs 118 pounds, blood pressure is 140 over 90.

The comparative measurements of the ankle were the same. The circumferential measurements, on the right of the thigh six inches above the patella, 17 inches; on the left $15\frac{3}{4}$.

Of the leg six inches below the patella, $10\frac{1}{2}$ on the [86] right, 11 on the left.

At the eight inch level below the patella, $9\frac{1}{2}$ — $9\frac{1}{4}$ on the right and $9\frac{1}{2}$ on the left.

Ankle measurements, circumference of the ankle, right 10 inches, left $10\frac{1}{4}$.

Circumference of the foot, $8\frac{1}{2}$ on the right, $8\frac{3}{4}$ on the left.

The other measurements were the same, on motion.

Q. Now, Doctor, did he also at this last examination inform you that he worked?

A. He went to work the 2d of April, he said, of '57, at a small place where he worked as a chef in the country.

Q. Now, in your opinion, Doctor, from the times that you have examined this man and have seen him

(Testimony of Dr. Colman Silbermann.)

over a period of years, would you say that his condition now—Strike that. Would you say that his injury was the cause of his present disability?

A. Yes, I think so. Of course, he is getting up in years, but there is nothing else that I can attribute it to. He is in good physical condition as far as his general health is concerned. He is 81 years old; he has a very good blood pressure. He has some arthritic changes in his spine, as shown by the X-ray films; but prior to this accident he worked, and I don't think it is of any importance in causing him to remain away from work. He is at the age where he could easily [87] have a lot more arthritic changes than show in the X-ray films. So I think that is incidental.

The reason, in my opinion, that he was away from work, excluding these operative periods that he had these two operations, would be because of his accident.

Mr. Emmons: Thank you, Doctor. I have no further questions, your Honor.

The Court: Mr. Woodward?

Cross Examination

Q. (By Mr. Woodward): I believe, Doctor, that you mentioned finding a varicose condition of both legs? A. Yes.

Q. And isn't it a usual symptom of varicose conditions that there is swelling in the lower extremities?

A. Frequently. These varicosities are not par-

(Testimony of Dr. Colman Silbermann.)

ticularly marked. He doesn't have swelling in the good leg. Sometimes varicose veins if they are marked, or frequently they will be excessively swollen.

Q. And it is also frequent, is it not, that there will be a more marked swelling in the varicose condition of one limb as compared to the other?

A. Well, first of all, he doesn't have marked varicose veins; and secondly I think that if a man has varicose veins of equal degree in both legs you would expect to find the same amount of swelling.

He had a job where he was standing working 48 hours and standing most of the time. I didn't think that the swelling was of too much importance. In fact, the comparison shows that the swelling is always on the left side.

Q. Well, that is often normal in varicose veins——

A. I examined him and I didn't see any reason to attribute it to anything else but the fracture. I would say that the varicose veins could be considered, but as long as there was no particular swelling on the right side, I am concluding that the swelling is largely due to the fracture. After a fracture in a limb it is quite common—in a leg, rather, it is quite common to get swelling.

Q. Yes. But to answer my question, it is also quite common in a varicose condition to have one leg swell more than the other and one leg to give more difficulty than the other?

A. I wouldn't say that unless the varicose veins were more marked in one leg than in the other.

(Testimony of Dr. Colman Silbermann.)

Q. But it is possible? A. How is that?

Q. It is possible?

A. If a man has a marked degree of varicosity in one leg and a minor degree in the other, I would say in the leg with the marked degree you would expect some swelling in it, yes. But this man has them both of about the same degree and neither [89] of them is very bad.

Q. I believe you stated in the course of your direct examination that Mr. Forfari limped due to the 30 year old injury, is that correct?

A. Yes, I think so; due to the shortening. He has one leg an inch and a quarter shorter than the other.

Q. And wouldn't that also put a strain upon his back in normal activity?

A. It does to a certain degree, yes. And he has these curvatures which nature brings about when one leg is shorter than the other, and in part—I don't think I should overlook the fact that this man hurt his back. At the same time he has one leg shorter than the other and that is productive of some curvatures in nature's attempt to have the man keep his balance.

Q. Isn't it also true that where a person has got a question of these natural curvatures that there is a potential of pain in the back and a great possibility of having discomfort?

A. Well, I will have to go along with him and take his credibility on it as being a fact. He told me that for many years he had no back trouble. It is a fact that many people have curvatures in

(Testimony of Dr. Colman Silbermann.)

their spine and they never have any trouble from it. Many people have arthritic changes in their spine and don't know it until some doctor takes X-ray pictures. [90]

This man has a pretty good work record, and he tells me that he hadn't had back trouble before.

Q. Do you see any connection between the later bladder difficulties in 1954 and the 1951 accident?

A. No, that is something which did not have anything to do with it.

Q. Isn't it also possible that some of his back pain could be attributed to the urinary difficulty?

A. Well, the man fell down stairs and hurt his back. I didn't see any reason to go look for something else. The man gave me a clean cut story of having no back trouble. It is a fact that during urinary difficulty there may be back ache.

Q. In fact, that is one of the common symptoms, is it not, of urinary difficulty, in the bladder and the kidneys, that there is back pain?

A. Frequently. But again I have to say that the man didn't give me any history of having trouble with his back.

Mr. Woodward: I have no further questions, your Honor.

Mr. Emmons: I have no further questions.

The Court: Doctor, just a couple of questions: As I understand it you found, either objectively or subjectively, evidence of two injuries that you attribute to this accident, the back and the left ankle.

A. Yes, your Honor.

(Testimony of Dr. Colman Silbermann.)

Q. Now will you tell me what, if anything, you found objectively in connection with the back injury?

A. Well, he has restriction of motion; he has complaint—many people contend that restriction of motion is a subjective complaint and can be simulated. On three examinations his restriction of motion was about the same, and his tenderness over one area, the lumbosacral articulation, and I consider those both are objective findings. Over a period of several years they remained about the same.

Q. And you as a medical man felt with reasonable certainty that that couldn't be in any way attributed to the injury to the hip 30 years ago?

A. No. It is in a different area, your Honor; the lumbosacral is in the middle of the back, and of course the hip is——

Q. I understand that, but I understand that the breaking of the hip brought about a curvature of the spine, and that takes in the lumbar area, does it not?

A. The curvature of the spine, I think, is the result—is not the result of the accident, but is the result of nature's method of having him walk a little bit better in keeping his balance because of the shortening of the left lower limb. Those curvatures were not caused by the accident.

Q. You mean the accident of '51.

A. Yes. [92]

(Testimony of Dr. Colman Silbermann.)

Q. I assume that some accident caused that breaking of the hip 30 years ago.

A. He had an automobile accident, yes.

Q. But you do not attribute the curvature of the spine in any way to this accident that occurred in '51?

A. No. I think that is a compensatory curvature which you get in people with shortened limbs or fractures of the hip and so on.

Q. Now, then, as a medical man it is your opinion, with reasonable certainty, then, that there is nothing about that hip injury and the curving of the spine, nature's curving of the spine, which would attribute to his subjective or objective, either one, complaints at this time?

A. No, I think not, because the man gave me a history of no previous subjective complaints, a good work report, and no back trouble. So I don't think they were productive of anything at all outside of what you could see; he had a stiff hip and curvature of the back. But I don't think they were productive of pain in the lumbosacral area.

Q. Was there anything besides pain that grew out of this back condition, as far as you can tell?

A. He has restriction of motion.

Q. What effect did that restriction of motion have upon his normal activities?

A. Well, he isn't able to bend in various directions as [93] well as he used to. His back, he contends, is also weak and he is unable to lift as much as he used to without aggravating his back pain.

(Testimony of Dr. Colman Silbermann.)

Q. Well, then, passing on to the left limb, I was rather interested. Apparently in every one of the three examinations that you made there was an atrophication of the left thigh.

A. There was some atrophy of the thigh, yes.

Q. Yes. On the other hand, there is a swelling of the lower extremity.

A. Swelling of the part below the knee.

Q. What do you attribute the atrophication of the thigh to?

A. Well, the atrophy of the thigh is at least in part due to the old injury, because of the fact that the fracture of the hip was a serious condition; but I think if you get a fracture of the ankle or a fracture of any portion of the leg you also get atrophy, and I think some of it can be attributed to the fracture of the ankle. I don't know how much. I think he had some before.

Q. Well, that is what is bothering me about this matter. What is there about this condition that would cause atrophy of the thigh and a swelling of the lower limb? When I say "this condition," I am speaking about the broken ankle. I am not interested in the hip, you understand. A. Yes.

Q. What is there about this broken ankle that would bring about atrophication of the thigh and swelling of the lower extremity?

A. Well, I think when you have a fracture anywhere near a joint, in practically nearly every case of fracture near a joint will be followed by swelling, especially in the lower limbs, because of circu-

(Testimony of Dr. Colman Silbermann.)

latory change from immobilization in plaster of paris and non-use. Atrophy, of course, also follows from non-use. The man favors it. Even now on the last examination he says he has to be careful because the ankle tends to fold on him.

Q. What did you find there to justify that complaint, if anything?

A. He had some restriction of motion of the ankle; still has.

Q. Well, does that come from the swelling or does that come from the fracture?

A. It comes from the fracture. A fracture of a joint involves not only the bone but the ligaments of the joint, and in a fracture such as he had the outer ligaments, the external ligaments of the ankle would be torn, necessarily, because of the site of the fracture.

Q. Well, now, was this fracture in the joint itself?

A. I have the films here, your Honor. I can show you.

Q. I don't care; your word is good enough for me. I have [95] to depend upon you. I wouldn't know anything about those films if I saw them, except maybe I might be able to see something there that was pointed out.

A. The fracture is in the lower portion of this outer bone, the fibula, and reaches into the joint—now I never saw the original films. The pictures I had were taken several months after the accident and the fracture had healed. But the roughening

(Testimony of Dr. Colman Silbermann.)

extends into the joint, so the presumption is that the fracture extended into the joint.

Q. In other words, on your films there is some roughening of the ball, so to speak, the joint ball——

A. The socket.

Q. The socket.

A. The socket is irregular and necessarily the articulating cartilage is damaged. I mean if a man gets a fracture into a joint, that joint is covered with cartilagenous material, and if the fracture extends into the joint the joint is roughened and the cartilagenous material is damaged, it doesn't heal smoothly any more.

Q. And you found that condition to exist?

A. You can see it in the films.

Q. In other words, I assume that is somewhat like bursitis, where you get a rough surface on one of the muscles and they work together and sort of act like sandpaper on one another?

A. It is somewhat similar, except that the bursitis, the common one that you see around the shoulder, is away from the [96] joint.

Q. I realize that. It is the effect of the formation of calcium on one of the muscles, to use the lay term?

A. That is right. To put it as briefly as I can, to try to put it in lay language, the joint is coated with smooth, oily material, called articulating cartilage, and all over that is a thin, oily material called synovial fluid, and when a man has a fracture into a joint that thin, smooth, frictionless area is

(Testimony of Dr. Colman Silberman.)

changed. The idea is that the joint moves without any friction, without any noise, and this thin, smooth, easy moving joint is disturbed.

Q. It is something like if you had a cracked bearing in an automobile.

A. The same thing, your Honor.

Q. Until such time as the bearing is replaced—unfortunately, nature hasn't provided any replacement for joints—I guess I have to back up on that: there are some instances where I think surgeons have replaced them, but generally speaking, such conditions continue with us for the rest of our lives.

A. That is right, your Honor. And I think another thing is this man is always going to stay that way, because of advanced years. It might be in a man of 20 the recovery is more rapid; but at his age I am sure it will continue.

Q. Well, I suppose that goes back to the condition of the bones; when we are younger the bones are a little softer, whereas [97] when we get along in years they become more solid.

A. That is right, your Honor, and there are changes also, at his age, in the arteries.

The Court: Anything else, Mr. Woodward?

Mr. Woodward: I would *would* to ask just one question: Doctor, would you call this a simple fracture?

A. Yes, I would say it is a simple fracture. I don't know what you mean by the term, but it is a simple—it is not a comminuted fracture, in several

(Testimony of Dr. Colman Silbermann.)

pieces, it is not a compound fracture where the bone came through the skin; to that extent. It isn't so simple in its after effect, but it is what is medically called a simple fracture.

Q. (By the Court): As I understand it, Doctor, you doctors recognize three different kinds of fractures: a so-called simple fracture, which may be a very complicated one practically——

A. That is right.

Q. ——but nevertheless it is one where there is simply a fracture of the bone; and a comminuted fracture where the bone has been broken into pieces; in other words, it is like breaking a mirror; and a compound fracture where the bone comes through the skin.

A. That is right. A simple fracture might not be a simple fracture in lay terms. It is simply one of the types of fractures. [98]

Q. Sometimes simple fractures are more troublesome than—well, certainly, than compound fractures? A. They can be.

Q. Comminuted fractures, of course, have their problems because of the disintegration of the bone.

All right, then, Mr. Emmons, do you have anything else?

Mr. Emmons: I have no further questions.

The Court: Mr. Woodward?

Mr. Woodward: No, your Honor.

Mr. Emmons: May this witness be excused, your Honor.

Mr. Woodward: No further questions.

The Court: The doctor may be excused.

Mr. Woodward: Yes.

The Witness: Thank you.

The Court: All right, you may be excused, doctor.

Mr. Emmons: Counsel, do you want any of these X-rays?

Mr. Woodward: If you don't mind. Since we have planned Mr. Forfari's examination this afternoon it might be well to have them.

The Court: Well, why don't you just stipulate that they can be left here, because if you mark them then you have the problem of getting them in the hands of the Clerk and getting them out of the hands of the Clerk.

Mr. Emmons: Let's just leave them here so the doctor can use them and then I will take them back to Dr. Silbermann. Is that all right? [99]

Mr. Woodward: That is quite agreeable, your Honor.

Mr. Emmons: Mr. Forfari. [100]

FERNANDO S. FORFARI

the plaintiff, recalled in his own behalf, previously sworn.

Direct Examination

Q. (By Mr. Emmons): Mr. Forfari, do you recall the accident of November 21, 1951?

A. Yes.

Q. And at that time you fell down the stairs in question?

A. Yes.

(Testimony of Fernando S. Forfari.)

Q. And as I recall the evidence, some employee helped you up, is that correct?

A. Yes, a fellow picked me up.

Q. Now, at that time did you feel any pain?

A. Yes.

Q. Tell us where you felt the pain?

A. In my ankle and my back. (Indicating.)

Q. Your left ankle, you pointed to your left ankle, is that right? A. Yes.

Q. Now, where did they take you from your place of employment?

A. They take me to the infirmary there.

Q. On the Naval base?

A. Yes, on the Naval base.

Q. And there what did they do for you?

A. They told me they can't put me in the hospital because [101] I work for the coffee shop, not for the government.

Q. Then where did they take you?

A. Take me down to the general hospital at Vallejo.

Q. While you were there in the Vallejo hospital, what did they do for you?

A. They take X-rays and put on a cast.

Q. A cast on your left leg?

A. A cast, yes.

Q. How long was the cast?

A. Oh, about—the first cast I had, was about six weeks, and the second one I had about four weeks.

(Testimony of Fernando S. Forfari.)

Q. You had two casts at two different times, is that right? A. Yes.

Q. Can you describe the length of the cast, I mean? Where did it extend, start and end?

A. The first one went well up to here (indicating).

Q. To the knee?

A. The knee, yes, my knee, almost. And the other one was lower.

Q. When you had this cast on your left leg were you able to walk around?

A. I used two crutches, you know?

Q. You used crutches? A. Crutches, yes.

Q. How long did you use the crutches? [102]

A. Oh, about five weeks. I don't remember just exactly.

Q. Did you use crutches all during the time you had the cast on? A. Yes.

Q. Did you have to use crutches after you took the cast off? A. Yes.

Q. For how long?

A. Four or five weeks, I guess.

Q. Was it necessary to use a cane after that?

A. Well, I used a cane because I was afraid to walk, you know, tumble down. I used a cane for quite a while.

Q. After this accident did you return to the cafeteria to work for a short while?

A. Yes, I worked, I think it was about four weeks, something like that.

(Testimony of Fernando S. Forfari.)

Q. Did you finally quit there, were you forced to quit there?

A. I told the manager, "I have to quit because I can't stand it, this is too much to stand up here."

Q. Were you working a 48 hour week then?

A. Well, it is eight hours work.

Q. A day?

A. Yes, but you get a half an hour when you eat, see; you get breakfast, a half hour, and another half hour for lunch; so it makes about seven hours working standing up. [103]

Q. Standing up on your feet?

A. Yes, I have to stand up there.

Q. Did you have pain during this time you were working? A. Oh, yes.

Q. Where was it located?

A. I had pain across my back and the ankle there, because the concrete floor is pretty hard to stand up in there.

Q. Did you at that job prepare all of the food?

A. I prepared some food, yes.

Q. In other words, you acted as the chef?

A. There was three cooks there to prepare, because there is quite a lot of people, you know, about five or six hundred people to eat.

Q. During that time you were working there did you have any time to go and sit down?

A. Not very much; the only time, we sit down on relief, that is all, a half a hour. They don't allow it there, you have got to work, because there is a lot of work to do, and I can't stand that much.

(Testimony of Fernando S. Forfari.)

Q. And as a result of that you had to quit that job, is that right? A. I told him, yes.

Q. Now, you went back to work, Mr. Forfari, for the first time on April 2d of this year, is that correct? A. That is right. [104]

Q. Now, before you went back to work in this year, which is over five years from the time of this accident, did you work at all during that time?

A. No. I tried to work, but I can't do anything, nobody give me any job.

Q. Did you go to the union to get a job?

A. Oh, yes, and I answered to the paper, too.

Q. What type of a job were you looking for, what type of work did you want?

A. I was looking for some kind of a job to work about four or five hours a day, something like that, you know, because I can't stand to work eight hours or longer.

Q. Now all during this time did you ankle swell on occasions?

A. Oh, yes, if I stand up too long, walk.

Q. Would it be necessary for you to bathe it in hot epsom salts, anything like that?

A. I have to sit down, yes.

Q. During that time did you have any pain in your back? Did you have any pain in your back during that time? A. Oh, yes, I had pain.

Q. At the present time, as you sit there now, do you have any pain in your back?

A. Pain all the time, even pain now.

(Testimony of Fernando S. Forfari.)

Q. Is that the reason why you are sitting there in that strained position? [105] A. Yes.

Q. Now you say that you went back to work for the first time on April the 2d of 1957? A. Yes.

Q. Where did you go back to work?

A. Well, the owner, in the paper, the owner at the place, I know him, he know me, and he put an ad in the paper, he look for a chef, a good man, Italian cook for his place. So in the ad he give his name and the telephone. So I know him, and I said, "I am going to call him up."

So I called him up, and he said, "Come over, if you want to work come over right away."

I said, "I can't come right away, but I can be there in a couple of days, I have to take care of my stuff and come over."

He said, "All right, be sure to come over."

So I went over——

Q. Before you go on, tell me, where is this place located?

A. That is located between, what you call it, Eureka—it is twelve miles from Eureka.

Q. Twelve miles from Eureka?

A. Yes, before you get to Eureka.

Q. And it is in a little town called Fernbridge?

A. Fernbridge, yes, that is the place, yes.

Q. And the place is called The Angelina Inn?

A. Angelina Inn, yes. [106]

Q. And you do the cooking?

A. And Fortuna, it is two miles—about three miles from Fortuna on the highway.

(Testimony of Fernando S. Forfari.)

Q. Now, while you were looking for this job you went and answered this ad, is that correct?

A. Yes.

Q. Now tell me this, what kind of work do you do there? As a chef? Do you work as a chef?

A. Yes, just cook the food.

Q. All right. Now let me ask you this, do you wait on tables?

A. No.

Q. Do you have to do any sweeping or cleaning?

A. No.

Q. Do you have to do any lifting?

A. No.

Q. Do you work only for one meal, that is, the evening meal?

A. One meal, six to ten-thirty; on Saturday about eleven, something like that.

Q. From six o'clock to about 10 o'clock at night, is that right?

A. Yes.

Q. And this establishment, is it principally, Mr. Forfari, a bar and not a restaurant, a tavern business?

A. Yes. [107]

Q. Is that what it is?

A. Yes.

Q. So that in the course of an evening for your meals that you have to prepare for the customers, how many meals do you prepare in the course of one evening?

A. Well, that depends. You see sometimes get five or six people come, have to prepare; but for an hour or so nobody come, because it is a night club, you know, no regular, only transient.

Q. So that in the course of your work in the

(Testimony of Fernando S. Forfari.)

evening there may be a hour or a hour and a half you are not doing anything at all? A. No.

Q. Is it all right with your employer—does he object to the fact that during this time you go and sit down? A. Oh, yes.

Q. You can rest, is that correct?

A. I can rest.

Q. Do you have to do any other kind of work there on this job?

A. No, I don't have to do anything else, only prepare the food, cook them, and the waiter comes and serves them.

Q. You don't wash dishes?

A. No, and they have got a man there to lift everything I need. [108]

Q. So am I right in this, that all you do is cook steaks and vegetables?

A. That is right, steaks, chicken——

Q. Make soup. A. That is right.

Q. And that is all you do?

A. That is all.

Q. In the light of your past experience over the years would you consider this a very light job?

A. Oh, yes.

Q. And despite how light your type of work is, while you are working do you still have pain in your back—— A. Yes.

Q. ——and in your ankle? A. Yes, sir.

Q. And despite that symptom of pain in your ankle and your back you still want to go to work, do you? A. That is right.

(Testimony of Fernando S. Forfari.)

Q. Tell me, Mr. Forfari, how much do you make a week? A. I make \$76.53 a week.

The Court: Is that net or gross?

Mr. Emmons: I think that is net, your Honor.

The Court: What is the gross?

Mr. Emmons: What is your gross, Mr. Forfari?

A. I beg your pardon? [109]

Q. How much is your gross?

A. Gross, what do you mean?

Q. You mentioned a hundred dollars. It is a hundred dollars a week?

A. Yes, about a hundred dollars a week. They have to charge for—they take out the tax and everything else.

Q. So then the net is \$76? A. \$76, yes.

Mr. Emmons: You may cross examine.

Cross Examination

Q. (By Mr. Woodward): Mr. Forfari, do you have any other income? A. I beg your pardon?

Q. Do you have any other income?

A. No, that is all I have, and social security.

Q. Do you receive social security?

A. Yes.

Q. Do you receive an old age pension?

A. Yes.

Q. How much is that?

A. \$64.90 a month, social security.

Q. Do you receive a California old age pension?

A. Oh, yes.

Q. And how much is it?

(Testimony of Fernando S. Forfari.)

A. I got about \$40 a week besides that. [110]

The Court: Now I think you are crossed up here now. That \$40 a week is something that he got other than—I think I can take judicial notice of the fact that if he is making a hundred dollars a week he can't collect any old age pension. He can collect his social security, because after you get, what is it, 72 or 73, you can collect anything you can make in addition to your social security.

Mr. Emmons: That is right.

Q. (By Mr. Woodward): You receive your social security, no question about that. Do you receive any other income at this time other than your wages at the inn?

Mr. Emmons: If your Honor please, I don't think that is material, unless it is by way of employment or work, because otherwise he might receive it from stocks or bonds or anything like that. Not that he has, but I mean it is possible, and I don't think it is material.

The Court: I don't know if I get your point, Mr. Woodward.

Mr. Woodward: Of course, he is contending that he has to work. I don't know if that is of any great materiality.

The Court: I don't think it is of any materiality at all. There are a lot of people down here on the west end of town who contend that they not only don't have to but they are not going to work. That still wouldn't deprive them of their right to compensation if they were injured.

(Testimony of Fernando S. Forfari.)

Mr. Woodward: I don't think that is right at all.

Q. Mr. Forfari, you stated you had some pain in your back? A. Oh, yes.

Q. And you went in 1954 to the doctors in Vallejo to see if they could help that? A. Yes.

Q. And you had an operation and it didn't help it too much, did it?

A. I had an operation in '55 and '56—I had two of them, two operations.

Q. And did the one in '56 assist you?

A. Yes.

Q. Did it make your back feel better?

A. No, there is still pain.

Q. But it is better than it was before you had the operation?

A. Oh yes, better than before, yes.

Q. So that the operation in 1956 helped you some? A. Yes.

Mr. Woodward: I have no further questions.

Redirect Examination

Q. (By Mr. Emmons): Mr. Forfari, when you say it helped you some, is that in regard to the urinary trouble that you had?

A. That is urinary, yes.

Q. It didn't help you as far as your back was concerned?

A. No, for the pain, no, but the urinary, yes. It is all right now. [112]

Mr. Emmons: I have no further questions.

The Court: Anything else?

Mr. Emmons: Yes, your Honor. In the file there is a letter which I directed to the Vallejo General Hospital. They omitted at the last time we were here to forward the correct records. Now, the correct hospital records are now in the custody of the clerk, and I will ask counsel if he will stipulate that they may be introduced at this time, because the custodian failed to deliver them when she was here last time. Otherwise I will have to subpoena her. They were forwarded to the clerk by the hospital.

Mr. Woodward: I have no objection, your Honor, to their coming in.

The Court: Are they in evidence now? Well, let all the records of the Vallejo Hospital be received and marked plaintiff's whatever is next in order. I don't have my original notes.

Mr. Woodward: No objection, your Honor.

The Clerk: No hospital records were here.

The Court: Well, are there any exhibits for the plaintiff?

The Clerk: Plaintiff's exhibits were a contract that was offered in evidence and one insurance policy.

Mr. Emmons: Well, I forgot. It was my understanding that I had introduced them last time.

The Court: All right, let these be received and marked [113] Plaintiff's Exhibit 3.

Mr. Emmons: Thank you.

(The hospital records were marked Plaintiff's Exhibit 3.)

Mr. Woodward: If the Court please, I understand that the plaintiff has nothing further to offer

at this time, and Mr. Forfari is to be examined by Dr. Raymond Wallerius this afternoon on behalf of the government, and Mr. Emmons and I have discussed the matter, and if Dr. Wallerius' report adds nothing of a controversial nature, I believe that after Mr. Emmons has had a chance to inspect it that we could submit the matter then on Dr. Wallerius' report.

Should either of us feel that the actual testimony of Dr. Wallerius is necessary, then may we petition the Court for hearing Dr. Wallerius at that time.

The Court: Well, why not put this matter over to a day certain? I want to get this case out of the way here.

Mr. Emmons: Yes.

The Court: It is beginning to get whiskers on it. This happened in 1951. I know it is of no fault of yours, Mr. Woodward.

Mr. Woodward: Well, I am very happy to proceed as quickly as we can, and I think Dr. Wallerius will get his report in very shortly.

The Court: How about putting it over to a law of motion day on the 30th for further proceedings, with the understanding [114] that you gentlemen will file something in writing at that time. If you want it set down for further proceedings I will give you the earliest date possible, and if you want to have it submitted on the basis of the record, why, you file a stipulation to that effect.

I will continue it over to the law in motion calendar of Monday, September 30th, with the understanding that neither one of you have to be here,

it will all be done in writing, but at least it will keep the court record straight on the matter.

Is that agreeable?

Mr. Woodward: Yes, your Honor.

Mr. Emmons: Perfectly agreeable, your Honor.

The Court: There is one thing: it has been so long since I heard the first part of this case I don't remember whether we explored the question of any compensation that Mr. Forfari may have received.

Mr. Emmons: Yes, there was a witness who testified——

The Court: That is what I thought.

Mr. Emmons: Yes.

The Court: That has been now almost a year ago and I have had quite a few cases since that time.

Mr. Emmons: I can explain that to you: the medical and compensation lien of the State Fund Insurance Company is \$4,085.76. He came and testified and presented his evidence——

The Court: That was my memory, but I wanted to be sure [115] we didn't have any misunderstanding. Since you weren't even here, Mr. Woodward, I know you are in a worst position than I am on it.

Mr. Emmons: I have prepared here a little memorandum concerning damages.

The Court: Why don't we do this: as soon as you have agreed upon which direction you are going to go, as to whether or not you want me to hear Dr. Wallerius, why don't you each submit an informal memorandum to me in a matter of a few days in which you tell me what you really think you are

entitled to. In other words, don't ask for a thousand dollars when you think you are entitled to five hundred because you believe I will cut it in two, but you just tell me — both of you write and tell me what you think is a reasonable amount and itemize it so I will have it before me.

Mr. Emmons: Yes.

The Court: And I will get this matter out of the way at the earliest possible moment. In the first place, time is running out on Mr. Forfari.

Mr. Emmons: Yes, it is not fair that he should be——

The Court: And I just don't like the delay. As I say, nobody here is to blame for it, but it is an unfortunate situation.

All right, then, this matter will be continued over to September 30th at 10:00 a.m. for further proceedings, with the [116] understanding that whatever proceedings we have at that time will be handled in writing, and if you want a further trial I will then set a day certain for further testimony.

Mr. Emmons: For cross examination of the doctor, yes.

The Court: And if there is going to be a further trial you better give us your dates that you can take it up, Mr. Emmons.

Mr. Emmons: Yes, I will do that.

The Court: All right. [117]

Certificate of Reporter Attached.

[Endorsed]: Filed August 29, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the accompanying Reporter's Transcript is the original filed in this case, in this Court and constitutes the Supplemental Record on Appeal.

Dated: August 29th, 1958.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16032. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Fernando S. Forfari, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: May 27, 1958.

Docketed: May 27, 1958.

Supplemental Filed August 30, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16032

UNITED STATES OF AMERICA, Appellant.

vs.

FERNANDO S. FORFARI, Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To: The Honorable United States Court of Appeals
for the Ninth Circuit.

Appellant, United States of America, in accordance with Rule 17(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby files Appellant's Statement of Points and Designation of Record in the above-entitled cause, as follows:

1. The District Court erred:

a. In holding that plaintiff was not an employee of the United States.

b. In failing to hold that plaintiff was precluded from maintaining a suit under the Federal Tort Claims Act by virtue of his status as an employee of a non-appropriated fund instrumentality of the United States.

c. In finding that under the law of the State of

California, liability would be imposed upon the United States if it were a private person.

d. In awarding judgment in favor of plaintiff.

2. Appellant hereby designates the following portion of the record to be contained in and printed as the record on appeal:

a. Complaint.

b. Answer.

c. The following portions of the Reporter's Transcript:

(1) Page 52, line 15, through page 55, line 5.

(2) Page 57, line 3, through page 61, line 5.

d. Plaintiff's exhibit #1.

e. Memorandum and order of August 2, 1957.

f. Memorandum and order of December 31, 1957.

g. Findings of fact and conclusions of law.

h. Judgment.

i. Notice of appeal.

j. This designation.

Dated: May 26, 1958.

LLOYD H. BURKE,
United States Attorney,

/s/ By ROBERT E. WOODWARD,
Assistant U. S. Attorney,
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 27, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF
ADDITIONAL RECORD

To the Honorable United States Court of Appeals
for the Ninth Circuit:

Appellee, Fernando S. Forfari, in accordance
with Rule 17(6) of the Rules of Practice of the
United States Court of Appeals for the Ninth Cir-
cuit hereby files his designation of additional parts
of the record which he deems material, as follows:

- (a) The entire Reporter's Transcript;
- (b) All plaintiff's exhibits in evidence;
- (c) All defendant's exhibits in evidence.

Dated: This 3rd day of June, 1958.

ERNEST E. EMMONS, JR. and
THOMAS M. MULVIHILL,

/s/ By ERNEST E. EMMONS, JR.,
Attorneys for Appellee.

[Endorsed]: Filed June 3, 1958. Paul P.
O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FERNANDO S. FORFARI, APPELLEE

On Appeal from the United States District Court
for the Northern District of California
Northern Division

BRIEF FOR THE UNITED STATES OF AMERICA

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FILED

DEC 5 1958

DAVID B. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16032

UNITED STATES OF AMERICA, APPELLANT

v.

FERNANDO S. FORFARI, APPELLEE

**On Appeal from the United States District Court
for the Northern District of California
Northern Division**

BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTIONAL STATEMENT

This is a suit against the United States under the Tort Claims Act to recover for personal injuries sustained by the appellee who, at the relevant time, was a civilian employee of a non-appropriated fund instrumentality of the United States. The injuries resulted from a fall down a staircase in a building owned and maintained by the Government and occupied by the Commissioned Officers' Mess of the Mare Island Naval Shipyard, Vallejo, California (R. 14-

15). The district court's jurisdiction was invoked under 28 U.S.C. 1346(b).¹

On August 2, 1957, the district court filed a Memorandum and Order on the issue of liability, deciding that issue in favor of appellee (R. 10-12). At the same time, the case was set down for further hearing for the purpose of determining the damages sustained. After trial on the issue of damages, the court, on December 31, 1957, filed a second Memorandum and Order fixing appellee's recovery at \$12,673.26 (R. 13-14). On February 5, 1958, the court filed its Findings of Fact and Conclusions of Law and entered a formal judgment (R. 14-19). Against this judgment, the court awarded the California State Fund Insurance Company a lien in the amount of \$4,085.76 for workmen's compensation benefits paid to the appellee for the same injuries. From the Memorandum and Order of December 31, 1957, and from the judgment entered in favor of appellee, the United States has appealed (R. 19). This Court's jurisdiction rests on 28 U.S.C. 1291.

¹ " * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

Appellee was employed as a chef by the Mare Island Cafeteria System, which is a non-profit cooperative association of civilian employees of the Navy Department, organized and operated under Navy regulations for the purpose of supplying food to personnel at the Mare Island Naval Shipyard (R. 15). (App. *infra*, pp. 22-28).² The Cafeteria System was providing food service to the Commissioned Officers' Mess as a contract concessionaire under the supervision of the Cafeteria Manager (R. 66-72).

The staircase down which appellee fell is located in the Officers' Mess and leads from the kitchen in which he was performing his duties up to a wash room normally used by the cafeteria employees (R. 26-27, 48). Under Navy Regulations, the Commissioned Officers' Mess occupied the government-owned building free of charge, and the Government retained responsibility for maintenance of the building. The district court found that appellee's injuries were proximately caused by the negligence of the Government in failing to provide a hand rail on the staircase, in permitting the protrusion of steel strips at the edge of each step, and in failing to light the staircase properly (R. 15). Appellee was found to have been free of contributory negligence.

With respect to appellee's employment relationship to the Government, the district court found that although the Commissioned Officers' Mess and the Cafeteria System were both non-appropriated fund instrumentalities of the United States, and although

² "App." references are to the appendix to this brief.

the appellee was an employee of the latter agency, he was not an employee of the United States precluded from maintaining suit under the Tort Claims Act (*ibid.*). The court also concluded that under the laws of the State of California, liability would be imposed upon the United States if it were a private person.

By reason of the injuries incurred in the accident upon which appellee based his claim, he received medical and hospital care paid for by the California State Fund Insurance Company in the amount of \$4,085.76 (R. 16). This company was the compensation insurance carrier for the Cafeteria System (appellee's employing agency), and the amount of the compensation award was fixed by the Industrial Accident Commission of the State of California. The insurance company was given a lien in this amount against appellee's judgment.

SPECIFICATION OF ERRORS

The district court erred:

1. In holding that appellee was not an employee of the United States.
2. In failing to hold that appellee was precluded from maintaining a suit under the Federal Tort Claims Act by virtue of his status as an employee of a non-appropriated fund instrumentality of the United States.
3. In finding that under the law of the State of California, liability would be imposed upon the United States if it were a private person.
4. In awarding judgment in favor of appellee.

SUMMARY OF ARGUMENT

As an employee of a non-appropriated fund instrumentality of the United States at the time of his injury, appellee was an employee of the federal government precluded, like all other federal employees, from maintaining a suit under the Tort Claims Act for injuries sustained in the course of his employment. The record clearly establishes, as the district court found, that the Mare Island Cafeteria System, which employed the appellee as a chef, is a non-appropriated fund activity and an integral part of the Department of the Navy. *Nimro v. Davis*, 204 F. 2d 734 (C.A.D.C.), certiorari denied, 346 U.S. 901. The Cafeteria System is a non-profit organization which was established pursuant to Navy Regulations and which is operated under close government supervision by military and civilian personnel of the Navy Department. It is the legal equivalent of post exchanges and officers' clubs which have been held to be arms of the Government possessing full governmental immunity from taxation and from suit. *Standard Oil Co. v. Johnson*, 316 U.S. 481.

It is well established that compensation remedies provided by the Government for injuries incurred by federal employees are the exclusive remedies which those employees have against the Government and constitute the Government's sole liability with respect to such injuries. *Johansen v. United States*, 343 U.S. 427; *Feres v. United States*, 340 U.S. 135; Federal Employees Compensation Act, 5 U.S.C. 757 (b). This rule places the United States in the same relationship to its employees as private employers

are placed by virtually every state workmen's compensation statute. And the rule applies despite the absence of an express exclusiveness provision in the statute providing for the compensation remedies.

Moreover, in the present case, if the United States were a private employer, it would not be liable in tort to the appellee and, therefore, cannot be held liable under the express terms of the Tort Claims Act. Appellee received a compensation award from the Industrial Accident Commission of the State of California for full benefits provided by the California compensation system. Under California law, this award constitutes an employee's exclusive remedy against his employer and precludes any further liability on the employer's part for the same injuries. *Duprey v. Shane*, 39 Cal. 2d 781, 789-90, 249 P. 2d 8, 13.

In addition, the Government by this award completely met its legal obligation, established by act of Congress, to provide compensation to an employee of a non-appropriated fund instrumentality in an amount not less than that required by the laws of the State where the instrumentality is located. This compensation remedy provided by the Government through its instrumentality is the employee's exclusive remedy, even if he is not deemed "an employee of the Government" because the financial burden of his compensation is borne by non-appropriated funds. *Aubrey v. United States*, 254 F. 2d 768 (C.A.D.C.).

ARGUMENT

Appellee's Status As A Civilian Employee Of A Non-Appropriated Fund Instrumentality Of The United States Precludes Him From Maintaining A Suit Under The Tort Claims Act For Personal Injuries Sustained In The Course Of His Employment

A. *The Cafeteria System is a non-appropriated fund instrumentality of the United States.*

As noted above, at the time appellee sustained his injuries, he was employed as a chef by the Mare Island Cafeteria System. The district court found that the Cafeteria System is a non-appropriated fund agency of the United States (R. 15). This finding is clearly correct.

The Cafeteria System is operated in accordance with official naval policy as set forth in Navy Civilian Personnel Instruction 66 (App., *infra*, pp. 22-28). This regulation authorizes the establishment of various employee services and governs their operations. The primary purposes of this program are (1) to make available for civilian employees facilities which reduce interruptions of work to a minimum and (2) to provide bases for the development of interest in their jobs and places of work (Sec. 2-1, App., *infra*, p. 22). The services are established and supervised as a command function, there is no proprietary interest in their funds, and any profits derived from their activities do not accrue to any individuals. "Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program." (Sec. 2-2, App., *infra*, p. 22). Em-

ployee services are declared by the regulations to be "an integral part of the Industrial Relations Program" and to be essential where "the absence of adequate community and business resources causes troublesome work interruptions." (Sec. 2-3, App., *infra*, pp. 22-23).

As a part of this general program, it is the policy of the Navy to make available necessary assistance and facilities so that civilian employees of the Navy will benefit from in-plant food service. (Sec. 4-1, App., *infra*, p. 23.) The food service is operated for the benefit of all employees of a particular activity through the medium of employee representatives. (Sec. 4-2, App., *infra*, pp. 23-24.) These representatives, who are normally appointed by the head of the activity, determine the operating policies and procedures, subject to his approval. The Industrial Relations Officer of the Navy is usually an *ex-officio* member of the System and serves as the liaison between that body and the head of the activity. (Sec. 4-2, App., *infra*, pp. 23-24.) The Cafeteria System decides whether to utilize an operating manager or a concessionaire, but again such decision is subject to the approval of the head of the activity. Should it decide upon a concessionaire (which it did not in this case), a contract is negotiated and signed by the head of the activity if he approves its terms and the use of the facilities. In addition, the contract is post-audited by the Office of the General Counsel. (Sec. 4-3, App., *infra*, pp. 24-25.)

The regulation requires that the food service be administered in conformance with law and that it

pay all necessary taxes. Only cash sales are to be made, and semi-annual audits must be conducted. The head of the activity receives the audits, establishes the rate of earnings, and determines the amount of insurance to be maintained by the food service. The sale of intoxicating liquor is prohibited unless expressly permitted by the Secretary of the Navy. The food service is operated in available government buildings, and all permanent improvements and equipment become the property of the Government. (Sec. 4-4, App., *infra*, pp. 25-27.)

The Court of Appeals for the District of Columbia Circuit has squarely held that employee food services of the Navy Department, established under Navy Civilian Personnel Instruction 66, are instrumentalities of the United States entitled to full governmental immunity from suit. *Nimro v. Davis*, 204 F. 2d 734, certiorari denied, 346 U.S. 901. The rationale of the decision is the one that we have outlined here. The applicable regulation is described as "a comprehensive set of directives to govern the establishment and operation of employee services," and the court noted the purposes and policies of this program as set forth in the regulation. 204 F. 2d at 735. The court stated (204 F. 2d at 736):

* * * They serve the same purpose in establishing and operating employee services in the Navy that War Department regulations serve in connection with post exchanges. In each the underlying purpose is the same, i.e., promotion of the Government's interests in the conduct of its military and naval activities.

* * * We think that relationship is such as to constitute the Board an arm of the Government, performing a governmental function as an integral part of the Navy Department, made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions (NCPI 66), to carry out a purpose declared by him to be an integral part of the Industrial Relations Program of the Navy Department.

B. Appellee was an employee of the federal government.

Since appellee was employed by a government instrumentality, it follows necessarily that he must be considered to be an employee of the federal government and, as such, must look to the compensation benefits provided him as his exclusive remedy for injuries incurred in the course of his employment.³ We have shown that appellee was employed by an agency which is an integral part of the Department of the Navy even though it is not operated on funds of the United States Treasury. Such instrumentalities have full governmental immunity from taxation and from suit. This proposition was made clear by the decision of the Supreme Court in *Standard Oil Co. v. Johnson*, 316 U.S. 481, holding that Army post exchanges (non-appropriated fund instrumentalities) are "arms of the Government" and "integral parts of the War Department" and that they therefore "partake of whatever immunities [the War Depart-

³ We show *infra*, pp. 19-21, that appellee's compensation benefits are his exclusive remedy against the United States regardless of how his employment relationship to the Government is characterized.

ment] may have under the Constitution and the federal statutes." 316 U.S. at 485. See also *Nimro v. Davis*, *supra*; *Borden v. United States*, 116 F. Supp. 873 (Ct. Cls.).

Congress has confirmed the status of civilian employees of non-appropriated fund instrumentalities as employees of the federal government. Following the decision in *Standard Oil Co. v. Johnson*, *supra*, the Civil Service Commission concluded that such employees were subject to the laws and regulations administered by the Commission, and the Department of Defense pointed up the difficulties inherent in this view (H.R. Rep. No. 1995, 82d Cong., 2d Sess. 3-4) :

To place such employees under civil-service rules and regulations would be detrimental to the operations involved and would impose a substantial hardship upon the normal operations of agencies engaged in nonappropriated fund activities. Since installation population is subject to rapid change it is necessary to operate exchanges to meet existing needs. At times it is necessary to employ and release these workers on a daily basis. Subjecting these employees to the laws pertaining to civil service would be a definite handicap to both these workers and the employing agency and would retard recruitment and add to the financial and administrative burden of the operation.

Because of this problem, Congress passed the Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. 150k, providing:

* * * We think that relationship is such as to constitute the Board an arm of the Government, performing a governmental function as an integral part of the Navy Department, made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions (NCPI 66), to carry out a purpose declared by him to be an integral part of the Industrial Relations Program of the Navy Department.

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An Act

To confirm the status of certain civilian employees of nonappropriated fund instrumentalities under the Armed Forces with respect to laws administered by the Civil Service Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act (39 Stat. 742), as amended (5 U.S.C. 751) and the following: Provided, That the status of these nonappropriated fund activities as Federal Instrumentalities shall not be affected. [Emphasis added.]

This statute makes it clear that employees of nonappropriated fund instrumentalities are federal employees and that special legislation was needed to remove them from the coverage of the civil service laws and the Federal Employees Compensation Act. But the status of the activities as federal instrumentalities is expressly left unaffected. In addition, in Section 2 of the Act (5 U.S.C. 150k-1), Congress

required that the instrumentalities provide "their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment," in lieu of the benefits of the Federal Employees Compensation Act. These provisions obviously do not strip the government employees involved of all of the attributes of federal employment.

Further evidence of this congressional understanding can be found in a recent amendment to this statute which makes the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-50) applicable to civilian employees of non-appropriated fund instrumentalities of the military departments.⁴ Pub. L. No. 85-538, 85th Cong., 2d Sess. (July 18, 1958), 72 Stat. 397. In the House of Representatives report supporting this legislation it is recognized that while such employees do not have the benefits of the Federal Employees Compensation Act, they are "Federal public servants in all respects" with the exceptions here discussed.⁵ Furthermore, as in the Federal Employees Compensation Act, the

⁴ This amendment is not applicable to the appellee for the sole reason that it operates prospectively only.

⁵ Compare *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill.), with *Faleni v. United States*, 125 F. Supp. 630 (E.D. N.Y.). The former case held that employees of non-appropriated fund instrumentalities are employees of the United States but nevertheless have a remedy under the Tort Claims Act. The latter case held that such employees are not federal employees, on the ground that neither their salaries nor compensation insurance is paid for out of appropriated funds. In our view, both cases ignore the considerations which we set forth here.

remedy provided by this legislation "shall be exclusive and in the place of all other liability of the United States." H. R. Rep. No. 1659, 85th Cong., 2d Sess. 4-5.⁶

C. The compensation benefits provided appellee by the Government through its instrumentality constitute his exclusive remedy against the United States.

1. *Employees of the United States are precluded from maintaining suits under the Tort Claims Act.* It is now well established that employees of the United States, civilian as well as military, cannot maintain suits under the Tort Claims Act for damages incurred in the course of performing their duties. E.g., *Johansen v. United States*, 343 U.S. 427; *Feres v. United States*, 340 U.S. 135; *Lewis v. United States*, 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869. In the *Johansen* case, the Supreme Court affirmed the dismissal of a suit against the United States brought by a civilian seaman to recover for injuries incurred in his employment aboard a public vessel and allegedly caused by the negligence of the United States. The Court held

⁶ The statute provides:

* * * Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute.

that since the injuries of the seaman were covered by the Federal Employees Compensation Act, suit would not lie against the Government under the Public Vessels Act even though the Compensation Act did not at that time expressly provide that its benefits constituted the injured employee's exclusive remedy. Similarly, in the *Feres* case, the Supreme Court held that a member of the armed forces could not maintain a suit under the Tort Claims Act for injuries sustained while in the performance of his duty. The Court noted that Congress had provided a system "of simple, certain and uniform compensation for injuries or death" (340 U.S. at 144) and construed the Tort Claims Act "to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." (340 U.S. at 139.) And in the *Lewis* case, the Court of Appeals for the District of Columbia Circuit rendered a similar decision with respect to a member of the United States Park Police. The unique relationship of these employees to the Government they serve, and the broad system of administrative remedies which Congress has provided to compensate them for damages arising out of their employment, preclude resort to the courts for any compensatory relief.

Congress itself has recognized and given effect to this general principle by a 1949 amendment to the Federal Employees Compensation Act which made express the formerly implied rule that the remedy provided by that statute for personal injuries sus-

tained in the course of employment was exclusive. 63 Stat. 861, 5 U.S.C. 757(b); see S. Rep. No. 836, 81st Cong., 1st Sess., 23. The *Johansen* and *Feres* cases make it clear that this exclusiveness clause is merely expressive of what would, even in its absence, be held to be an incident of federal employment. See also *United States v. Brooks*, 169 F. 2d 840, reversed on other grounds, 337 U.S. 49.

As noted *supra*, pp. 12-13, in the case of employees of non-appropriated fund instrumentalities, Congress has provided a compensation system for injuries or death sustained in the course of employment by establishing a statutory requirement that the instrumentalities furnish such compensation by insurance or otherwise. 5 U.S.C. 150k. The obvious purpose of this requirement, and the simultaneous exemption of employees in this category from the coverage of the Federal Employees Compensation Act, is to insure that the employees have a normal compensation remedy against their employer and, at the same time, to shift the financial burden from public to non-appropriated funds. The compensation which the instrumentalities are required to furnish must be "not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located."⁷ The remedy against the Government is thus as complete as the remedy against a private employer under

⁷ Federal legislation was necessary since instrumentalities of the Government cannot be regulated by state workmen's compensation statutes. *E.g.*, *Humphrey v. Poss*, 245 Ala. 11, 15 So. 2d 732.

local law. And in the recent amendment to the statute (see pp. 13-14, *supra*), Congress again made express the formerly implied rule that the compensation remedy is exclusive and in place of all other liability of the United States.

The history of this legislation is thus the exact parallel of the Federal Employees Compensation Act which applies to the great bulk of federal employees compensated from appropriated funds. In both cases, the compensation remedy is the exclusive remedy, and in both cases Congress by amendment to the statute has confirmed prior judicial doctrine. If the appellee were permitted to prevail in this litigation, he would be obtaining an additional remedy which, under the express terms of the statute as it now reads, Congress has declared should not be available.

2. *Compensation benefits constitute an employee's exclusive remedy against his employer under California law.* The principle of the *Johansen* and *Feres* cases—that compensation benefits are the exclusive remedy against the Government for federal employees injured in the course of their employment—conforms with the express policy of the Federal Employees Compensation Act, the recent amendment to 5 U.S.C. 150k, and virtually every state workmen's compensation law, including the law of the State of California, where the appellee's injuries occurred. Under Section 3601 of the California Labor Code, an employee is precluded from bringing a tort action against his employer for compensated injuries. See *Duprey v. Shane*, 39 Cal. 2d 781, 789-90, 249 P. 2d

8, 13. It is for this reason that the district court committed error in ruling that under California law, liability would be imposed upon the United States if it were a private person.

Of course, under the Tort Claims Act, the Government incurs liability for injury only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). For this reason, the exclusiveness clause of the California compensation statute precludes recovery by the appellee in this case. It is undisputed that he was awarded full medical and disability payments by the Industrial Accident Commission of the State of California pursuant to the California compensation system (R. 16). Thus, the California State Fund Insurance Company received a lien in the amount of \$4,085.76 against the judgment entered in appellee's favor (R. 17). These compensation payments constitute the Cafeteria System's complete compliance with the requirements of federal statute (5 U.S.C. 150k) and constitute a normal compensation remedy for the appellee. Since a private employer in California could incur no tort liability for the injuries involved here, the United States cannot be burdened with such liability. Any other result flouts the express terms of the Tort Claims Act. The correctness of our position thus rests, not only upon a construction of the Tort Claims Act which will fit it "into the entire statutory system of remedies against the Government," in accordance with the *Johansen* and *Feres*

cases, but upon the very terms of that statute, under which the Government's tort liability can be no greater than that of a private person similarly situated.

3. *Compensation benefits are appellee's exclusive remedy against the United States regardless of how his employment relationship to the Government is defined.* We believe it is clear that the appellee, as an employee of a non-appropriated fund instrumentality of the United States, was an employee of the federal government precluded, like all other federal employees, from maintaining a suit under the Tort Claims Act. However, regardless of how his employment relationship to the United States is characterized, appellee's compensation benefits constitute his exclusive remedy against the Government for injuries sustained in the course of his employment. This was the holding of a recent decision of the Court of Appeals for the District of Columbia Circuit (opinion by Justice Reed). *Aubrey v. United States*, 254 F. 2d 768. In the *Aubrey* case, a civilian employee of a Naval Officers' Mess (a non-appropriated fund activity) brought suit under the Tort Claims Act for injuries sustained from a fall in a government building. As was true of the appellee here, *Aubrey* received medical and disability payments for the injuries under a compensation insurance policy provided by the Mess as required by 5 U.S.C. 150k. The court of appeals affirmed the judgment of dismissal entered in favor of the Government by the district court.

The decision of the court of appeals was not based

on the fact that Aubrey was a government employee since the parties had stipulated that he was not such an employee at the time of his injury. The Government unsuccessfully argued that the real meaning of the stipulation was that Aubrey was not a government employee only for the purposes of the civil service laws and the Federal Employees Compensation Act, *i.e.*, that he was the kind of government employee described in 5 U.S.C. 150k, *supra* p. 12. The court of appeals held the Government to a strict reading of the stipulation but nevertheless ruled that "the compensation provided by the Officers' Mess, an instrumentality of the United States, was Aubrey's exclusive remedy against the United States." 254 F. 2d at 770. And this ruling was made prior to the 1958 amendment to the compensation statute which contains an exclusiveness clause. The court thus applied the rationale of the *Johansen* and *Feres* cases to employees of government instrumentalities regardless of whether or not they are considered employees of the United States. The court declared (254 F. 2d at 772):

We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in *Feres* and *Johansen* that the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality by the Government through a system 'of simple, certain and uniform compensation for injuries or death.' * * * We do not think the fact that the insurer is not the United States

but a private insurance carrier requires a distinction between this case and *Feres* or *Johansen*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with instructions to enter judgment for the United States.

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APPENDIX

Navy Civilian Personnel Instruction 66 provides in pertinent part:

Section 2

* * * *

2-1. PURPOSES OF EMPLOYEE SERVICES.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

2-2. DEPARTMENT POLICY.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

2-3. ORGANIZATION AND ADMINISTRATION.—a. *Principles of operation.*—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its

employees, and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

* * * *

Section 4

* * * *

4-1. GENERAL STATEMENT.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in-plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

4-2. ADMINISTRATION OF FOOD SERVICE.—*a. Organization.*—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria Association designated through an elective process, or nominated

by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section.

b. Function of Cafeteria Association.—The Cafeteria Association (or such other title as is selected) is responsible for developing, recommending, and executing plans for operation of the food service, subject to approval of the head of the activity. The Cafeteria Association may operate its food service either through employment of a manager or by entering into an agreement with a concessionaire.

c. Responsibility of Industrial Relations Officer.—As a representative of the head of the activity, and to coordinate the activities of the Cafeteria Association with other operations of the establishment, the Industrial Relations Officer is usually appointed as an ex-officio member of the Association. The Industrial Relations Officer, functioning in this capacity, shall advise and assist the Association, and act as immediate point of contact between the Association and the head of the activity.

4-3. OPERATION OF FOOD SERVICE.—*a. Operation by employment of a manager.*—Where the decision of the Association, as approved by the head of the activity, is that it would best serve the activity's interests to employ an operating manager rather than the services of a concessionaire, an appropriate directive or station order with copy to OIR 235 will be issued, setting forth the conditions of operation, and giving the

Cafeteria Association authority to use the facilities under the conditions prescribed in NCPI 66.4-4. It is suggested that in such a case the Cafeteria Association organize itself into a non-profit corporation in order to avoid personal liability for operations in connection with the food service.

b. Operation by concessionaire.—Where the decision of the Cafeteria Association, as approved by the head of the activity, is to utilize the services of a concessionaire, any contract arrived at to secure such service should be negotiated between the Association and the concessionaire as the contracting parties, and should bear the signature of the head of the activity only as to approval of the terms of the contract and the use of the facilities. Such contract shall not obligate funds of the United States or otherwise bind the Government. Each contract will contain all provisions required by NCPI 66.4-4. A copy of each contract entered into will be forwarded to OIR 235 for post audit by the Office of the General Counsel. It is not necessary to secure prior approval on such contracts.

4-4. REQUIREMENTS OF OPERATORS.—*a. Conformance with laws.*—The food service shall be administered in compliance with all applicable state, municipal, and other local laws if such state, municipal, or other local government has jurisdiction over the area of the operation.

b. Taxation.—The food service shall pay, as and when due, any and all taxes becoming due by virtue of the operation of such food service, including, but not limited to, all real estate or other taxes which may be held to be properly

imposed on its possessory interest in the right to use the government premises. When the association employs a manager, it is considered a non-profit cooperative for tax purposes.

c. Cash sales.—All sales are to be for cash, and credit in any form is to be prohibited.

d. Audits.—Semi-annual or more frequent audits of the food service shall be made and submitted to the head of the activity. These audits should be made by an independent certified public accountant, and at the expense of the food service operator. In small activities, or in unusual circumstances, the head of the activity may direct station personnel to perform this duty.

e. Earnings.—The head of the activity shall establish a reasonable maximum rate of earnings for food service operations.

f. Use of profits.—Income from food service and associated services is to be used primarily for improving food service; secondarily for such welfare and recreation as will benefit the employees of the activity.

g. Insurance.—The Cafeteria Association or concessionaire shall maintain product, personal, and public liability insurance in amounts determined by the head of the activity.

h. Prohibited sales.—The sale of intoxicating liquors, beer, ale, or other intoxicating beverages, is prohibited except when expressly permitted by the Secretary of the Navy.

i. Equipment and fixtures.—Restaurant services may be operated in available government buildings. Necessary equipment, fixtures, cooking utensils, dishes, and silver may be furnished

or purchased by the government if funds are available. All such equipment shall remain the property of the government and responsibility for its inventory and replacement in initial condition, subject to reasonable wear and tear, shall rest with the user.

j. Property.—Title to all permanent improvements of government property shall be vested in the Government regardless of who makes them or causes them to be made.

k. Utilities.— * Utility services will be furnished by the Government to food service operators, but shall be paid for by the operator at the close of each month. The rates specified by paragraph 66405 of the Bureau of Supplies and Accounts Manual are applicable to cafeterias operated by concessionaires, while the rates specified by paragraph 67104 are applicable to cafeterias operated by managers. *

4-5. USE OF GENERAL MESS.—When facilities are not available to provide adequate food service, authority to use the general mess may be requested from the Bureau of Supplies and Accounts according to the provisions of Volume IV, Chapter 1, Section VI, Bureau of Supplies and Accounts Manual.

4-6. USE OF COMMISSARY STORE.—Civilian employees are authorized patrons of commissary stores outside the continental limits of the United States where the head of the activity so directs. The Secretary of the Navy may extend commissary privileges within the continental United States according to the provisions of Bureau of Supplies and Accounts Manual, Volume IV,

Chapter 4, Part G, Section II. Requests for such privileges shall be submitted to the Chief, Bureau of Supplies and Accounts.

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No. 16,032

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FERNANDO S. FORFARI,

Appellee.

Appellee's Reply Brief

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In the

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For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

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FERNANDO S. FORFARI,

Appellee.

Appellee's Reply Brief

STATEMENT OF FACTS

On November 21, 1951, there was in existence, at the Mare Island Naval Yard, Vallejo, California, an organization known as the Commissioned Officers' Club, a purely social club, having no government or naval function. This club was housed in a building owned by the Navy, for which the club paid no rent. Maintenance and repairs to this building were by the Navy. All other expenses including utilities were paid for by the club members. The club employed six people, a manager, a janitor and four office workers, whose salaries were paid by the club from its own revenues. The club carried liability insurance for the protection of its members from civil liability arising from the operation of the club's activities. The building had a kitchen and dining room: meals for members were prepared in the kitchen.

Sometime prior to November 21, 1951, the Commissioned Officers Club had entered into a contract in writing with the Mare Island Cafeteria System to provide the food for its members in its dining room, including all necessary employees to accomplish this, using the club's kitchen for cooking and preparing meals. These employees were not employees of the Commissioned Officers Club but were employed and paid by the Mare Island Cafeteria System.

The Mare Island Cafeteria System was organized pursuant to U. S. Naval Regulations for the purpose of supplying hot food to Mare Island Naval Yard employees, mostly civil. It was operated and managed by a civilian manager who looked to a Board of Directors, civilians, and ultimately to the Commandant of the Naval Yard for determination of final authority.

To carry out this purpose the Mare Island Cafeteria System maintained one control kitchen where the food was cooked, prepared and distributed to four cafeterias and eight canteens.

Prior to the date in question, the Mare Island Cafeteria System took out a policy of Workmen's Compensation Insurance with the State Compensation Insurance Fund of the State of California providing employer liability insurance and compensation insurance for its employees.

It is admitted by the Government that both the Commissioned Officers Club and the Mare Island Cafeteria System were non-appropriated fund functions on the date in question.

Plaintiff, some time prior to November 21, 1951, was employed by and paid by the Mare Island Cafeteria System as a chef, working in the kitchen in the building occupied by the Commissioned Officers Club.

On the day in question, plaintiff had not reported for work, and before changing clothes to start work went up

some stairs leading from the kitchen to a lavatory. There were nine steps approximately 40 inches wide enclosed by a wall on both sides. There was no handrail on either side of the stairs which were fairly steep. The steps were painted or were covered with linoleum and had a metal strip across the front of each step which raised above the level of the step a distance of 1/10th to 1/4th of an inch approximately. There was no light on the stairway but there was an electric light in the hall at the head of the stairs in the upper hallway.

Plaintiff, before this date walked with a limp, having injured his left hip in a previous accident some years before which resulted in this disability.

On the day in question, leaving the lavatory, plaintiff, with his back to the light in the hallway, started to descend this stairway; stepping on the second step, his left heel caught on the metal strip across the front of the step and caused him to fall forward and down to the bottom of the stairs, thereby receiving serious personal injuries.

Prior to this accident, the manager of the Commissioned Officers Club spent all of his working hours in the building supervising the club's activities, its maintenance, care and inspection for possible need for repair or defects; the janitor employee of the club took daily care of the stairs in question and lived in a room adjacent to the lavatory at the head of the stairs; defects and need for repairs were reported to the Navy's department of public works for attention.

The Government voluntarily admits that shortly after this accident a handrail was installed by the Navy extending down the right hand wall when descending. Defendant's exhibit "A" photograph does not show this as the picture is taken at an angle to avoid it showing.

SUMMARY OF APPELLANT'S ARGUMENTS ON APPEAL

Appellant's main argument urged in support of reversing this judgment in appellee's favor is simply stated: appellee is an employee of the United States, and as such, is (1) precluded from suing under the Federal Tort Claims Act, or (2) if allowed to sue thereunder, would be barred from recovery under local state law. Although appellant has specified four errors allegedly committed by the court below, the four are really reduced to one: that the District Court erred in finding the appellee was not an employee of the United States. Specifications of error 2, 3, and 4 flow naturally from, and are premised upon, the correctness of alleged error number 1: that appellee is an employee of the United States. If it is determined that appellee is not an employee of the government, as found by the court below, then appellee can sue under the Federal Tort Claims Act, and appellant would be liable under California law.

ARGUMENT IN SUPPORT OF THE JUDGMENT

- I. **The District Court Correctly Held That Appellee Is Not an Employee of the United States.**
- A. **THE CASE AUTHORITY HAS UNIFORMLY HELD THAT AN EMPLOYEE OF A NON-APPROPRIATED FUND ACTIVITY (1) IS NOT AN EMPLOYEE OF THE UNITED STATES, AND (2) MAY MAINTAIN SUIT UNDER THE FEDERAL TORT CLAIMS ACT AGAINST THE UNITED STATES.**

It is appellant's contention that since appellee is a civilian employee of a non-appropriated fund activity, which is a "federal instrumentality", "it follows necessarily that he must be considered to be an employee of the United States". (Appellant's Brief, page 10). However, even though the Mare Island Cafeteria System is a non-appropriated fund activity and a "federal instrumentality", appellant's conclusion does not necessarily follow. In fact it completely ignores *Faleni v. United States*, 125 F.Supp. 639 (E.D. N.Y.

1949), where the District Court, in denying the government's motion to dismiss, squarely held that the plaintiff, employed as a civilian laundry worker by the Ship's Service Department, also a non-appropriated fund activity, *was not an employee of the United States*. The court clearly rejected the argument advanced by the government that since the Ship's Service Department was an instrumentality of the United States it necessarily followed that an employee-employer relationship existed between the plaintiff and the government. See *Roger v. Elrod*, 125 F. Supp. 62 (D.C. Alaska, 1954), where the court, in distinguishing *Faleni v. United States*, supra, stated at pages 63 and 64 that "in the Faleni case, the plaintiff was a civilian and clearly served only in the capacity of employee of the Ship's Service Department". In *Grant v. United States*, 162 F. Supp. 689 (E.D. N.Y., 1958), the court, in explaining *Faleni v. United States*, supra, stated that if Mrs. Rooney, a civilian employee of the Ship's Service Store of the Merchant Marine Academy (a non-appropriated fund activity), "were suing the defendant to recover damages for an injury attributable to her employer, the decision would constitute an authority to the effect that no recovery could be had by her against the United States" (at page 693). This conclusion resulted from the fact that if Mrs. Rooney were injured by "her employer", who was the non-appropriated fund instrumentality of the federal government, it naturally followed that the United States, who was *not* "her employer", would incur no liability thereby. Thus, it is readily apparent that *every court which has considered the question has concluded that an employee of a non-appropriated fund activity, even though a federal instrumentality, is not an employee of the United States*.

In fact, *the government has recently acknowledged that an employee of a non-appropriated fund activity is not an*

employee of the United States. In *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir., 1958), even though the government stipulated that the plaintiff husband, *a civilian employee of the Officers Mess* (a non-appropriated fund activity), was not an employee of the United States, the court granted the government's motion for summary judgment *as to the husband* on the ground that the remedy provided in 5 U.S.C. 150k-1 was his exclusive remedy. However, the court denied the government's motion as to the plaintiff wife who sought damages for loss of consortium due to the husband's injury. Since the government had stipulated that the husband was not an employee of the United States, the court held that *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir., 1957), did not preclude the wife's claim. In *Smither & Co. v. Coles*, supra, the court held that a wife could not sue her husband's employer for loss of consortium as the Workmen's Compensation Act was intended as the employer's exclusive liability.

At first blush it might be thought that *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill., 1955) is inconsistent with or reached a contrary conclusion to appellee's position herein and to the cases already cited and relied upon by appellee. However, the court in *Daniels*, supra, held that the plaintiff, a civilian employee of the Exchange (a non-appropriated fund activity), *was not an employee of the federal government for purposes of the Federal Tort Claims Act*.

Appellant argues that both the *Faleni* case and the *Daniels* case "ignore the considerations which we set forth here". (Appellant's Brief, page 13, footnote 5). What new considerations have appellants set forth here? Obviously none which were not fully considered and rejected by the cases relied upon by appellee. It is evident from appellant's brief (pages 7-14) that the government's new consideration

is the fact that the Cafeteria System is a "federal instrumentality" (*Nimro v. Davis*, 204 F.2d 735 (D.C. Cir., 1953); Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. 150k); and therefore its employees are necessarily government employees. However, as appellee has already pointed out, the court in *Faleni v. United States*, 125 F. Supp. 630 (E.D. N.Y., 1949), expressly rejected this argument which was also advanced therein by the United States. The court, after assuming that a non-appropriated fund activity is a federal instrumentality, nevertheless held that *a civilian employee of such an activity could sue under the Federal Tort Claims Act since he was not an employee of the United States*.

Furthermore, the *Congressional intent* expressed in 5 U.S.C. 150 clearly indicates that *employees of non-appropriated fund activities are not federal employees even though such activities are federal instrumentalities*. In order to allay doubts created by *Standard Oil Co. v. Johnson*, 316 U.S. 481, Congress enacted 5 U.S.C. 150k (66 Stat. 138, 1952) specifically providing that employees of such activities are not federal employees for purposes of the Federal Employees' Compensation Act or the Federal Civil Service Act. *Aubrey v. United States*, 254 F.2d 768 (D. C. Cir., 1958). Congress, at the same time it declared employees, such as appellee, not to be federal employees, retained the sovereign privileges and immunities of such activities. Thus, it is clear that *Standard Oil Co. v. Johnson*, 316 U.S. 481, relied upon so heavily by appellant, is inapplicable since the Congressional intent shows clearly that appellee is not a federal employee.

The meaning of "employee of the United States" within the meaning of the Federal Tort Claims Act is well illustrated by *Comelin v. United States*, 177 F.2d 275 (5th Cir.,

1949). In that case the court held that a federal judge and a trustee in bankruptcy were not federal employees within the meaning of the Tort Claims Act. This holding was reached even though the federal judiciary is expressly created by the United States Constitution, the members thereof are appointed by the President and confirmed by the Senate, and their salaries are paid out of the United States Treasury. The facts in this case bring appellee squarely within the rule of *Comelin v. United States*, supra. It is clear under the facts adduced herein that employees of non-appropriated fund activities are no more subject to control by the appellant than are federal judges, and should not be considered as employees within the meaning of the Tort Claims Act.

It is interesting to consider what the appellant's position would be with respect to appellee's employment status if the United States were sued by a third party for injuries caused by appellee's negligence. As a result of the enactment of 5 U.S.C. 150k-1, appellee would be precluded from suing the government under the Federal Tort Claims Act. Appellee's sole remedy for tortious injury would be as provided in 5 U.S.C. 150k-1. *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir., 1958). Thus, it is clear that the United States, in attempting to avoid liability in such a suit, would argue that no employee-employer relationship existed between it and appellee. Appellee asserts that the government should not be permitted to adopt such opposed, inconsistent views from case to case.

B. THE APPLICATION OF ACCEPTED COMMON LAW PRINCIPLES USED IN DETERMINING THE EXISTENCE OF AN ALLEGED EMPLOYEE-EMPLOYER STATUS REVEALS (1) THAT APPELLEE WAS NOT AN EMPLOYEE OF, NOR EMPLOYED BY THE UNITED STATES, AND (2) THE APPELLANT HAS FAILED TO ASSUME THE BURDEN OF PROOF REQUIRED OF IT.

If the Court does not agree with the contentions and authorities in A, supra, appellee then contends that accepted common law principles used in testing the existence of an alleged employee-employer relationship are applicable, and such principles, under the facts of this case, reveal that no employment relationship existed between appellee and appellant. At common law, four elements are used to determine whether an employment status exists: (1) the selection and hiring of the employee; (2) the payment of the employee's wages; (3) the power to dismiss the employee; and (4) the right to control the means and methods by which the employee shall perform the work, as well as the end result. *Matcovich v. Anglim*, 134 F.2d 834 (9th Cir., 1943). The United States has not undertaken to prove, as it has the burden of doing, the existence of these elements. It is appellee's contention that not one of the four elements constituting the employment status could possibly or does exist in this case.

1. The Selection and Hiring of Appellee Was Not Done by Nor on Behalf of the United States.

It is elementary that the employee-employer status can arise only if there is an express or implied consensual or contractual agreement between the parties. See *Benway v. Missouri-Kansas-Texas R. Co.*, 26 F.2d 383; *Fleming v. A. H. Belo Corp.*, 121 F.2d 207, aff. *Walling v. A. H. Belo Corp.*, 316 U.S. 624, reh. den. 317 U.S. 706.

In this case, the facts do not disclose, nor has appellant attempted to prove that a contract existed between appellee and the defendant. The only evidence bearing on the rela-

tionship of the United States to contracts entered into by the Cafeteria System is as follows: Appellee testified without contradiction that he was employed by the Cafeteria System (Transcript page 5, lines 20-23). There is no evidence indicating that the contract of employment was other than between appellee and the Cafeteria System. Further, the testimony of Mr. Dale Sexton, the civilian manager of the Officers Club at the time of the injury, reveals that all of the contracting for the services performed by the Cafeteria System was done only with and by the System, and not by the United States. Mr. Sexton testified on cross-examination that the Officers Club had a contract with the Cafeteria System whereby the latter supplied kitchen workers and food to the former (Transcript, page 27, lines 18-23). Mr. Sexton "had nothing to do with those employees and food" (Transcript, page 36, lines 24 and 25). This is because the employees of the Cafeteria System were under the control and supervision of the civilian manager employed by the Cafeteria to supervise its function.

It is clear that as a matter of law the United States could not enter into a contract with appellee: appellee's contract of employment could not legally have been the contract of the United States. In *Pulaski Cab Co. v. United States*, 157 F. Supp. 955 (Ct. Cl., 1958), the court, in upholding the validity of a Department of the Army Regulation providing that "contracts involving Exchanges are not government contracts", stated that this regulation "follows naturally from the fact that the operation of the Post Exchange is carried on from non-appropriated funds" (at page 957). In *Bleueri v. United States*, 117 F. Supp. 509 (D.C. So. C., 1950), the plaintiff, the former manager of the Marine Corps Officers Open Mess, sued the government for breach of the contract of employment. The court held that the plaintiff could not sue the United States for breach of a contract

made with a non-appropriated fund activity. In *Edelstein v. South Post Officers Club*, 118 F. Supp. 40 (D.C. Va., 1951), the court held that *a contract made by the Officers Club was not an obligation of the United States, but solely a liability of the Club, a non-appropriated fund activity*. In *Borden v. United States*, 116 F. Supp. 873 (Ct. Cl., 1953), the court held that the plaintiff, a former civilian chief accountant of a Post Exchange, could not sue the government on an employment contract with the Exchange, a non-appropriated fund activity. Since appellant can not be held liable on contracts executed by non-appropriated fund activities, the only reasonable conclusion that can be drawn from the above cases is that no contract existed or could exist between the appellee and appellant.

Thus, appellee asserts that the District Court properly held that the United States was not appellee's employer either (1) upon the ground that the appellant failed to prove such relationship, as it had the burden of doing, or (2) on the basis of the *Edelstein*, *Borden*, *Pulaski*, and *Bleueri* cases cited and discussed above.

2. The Government Did Not Pay Appellee's Wages.

By statute, the operation of non-appropriated fund activities, including employees' wages, must be maintained and supported solely by funds derived through the operation of such activities. Appellee's wages were paid by the Cafeteria Association from funds obtained through the operation of the food service activities. Appellee does not understand the United States to contend the fact is otherwise.

3. The United States Does Not Have the Right or Authority to Dismiss Employees of a Non-Appropriated Fund Activity.

Appellant has the burden of proving the United States has the authority to dismiss appellee. (See discussion under

5, *infra*). It has failed to do so. In fact, it seems clear from reading C.N.P.I. 66 that such power is vested exclusively in the Cafeteria Association and its civilian manager.

4. The United States (a) Does Not Have the Right to Control the Means and Methods by Which Appellee (or the Cafeteria System) Performs His Work, and (b) Has Not Undertaken Its Burden of Proving that Such Right of Control Exists.

(a) A thorough examination of the cases reveals that in no case has a court reached the question of the right to control unless or until the necessary express or implied agreement has been first found to exist, which appellee has already shown does not exist in this case. Once it has been determined that such an agreement exists between the parties, then an essential element is the right of controlling the method and means, as well as the end result, by which the work is to be done. *Matcovich v. Anglim*, 134 F.2d 834 (9th Cir., 1943). In this connection it should be emphasized that the right of controlling the method and means of performance must be substantial. "It is established that where one is performing the work in which another is interested the latter may exercise a certain measure of control for a definite and restricted purpose without acquiring the responsibilities of an employer. Some such supervision is inherent * * *" *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702, 706 (D.C. Cal., 1944).

It is obvious that appellant did not have the right to control the manner and method by which the Cafeteria System's employees performed their work. The Cafeteria System is charged with the duty of developing and executing the operation of the food service. C.N.P.I. 66 4-2a (Appellant's Brief page 23-24), although a regular naval officer serves in an ex-officio capacity. C.N.P.I. 66 § 4-2c (Appellant's Brief, page 24). However, this officer may only advise and assist

the Association, and act in a liaison capacity for the Navy. Thus, it is apparent that the naval regulations do not give the government the right to control the method and the means by which the work shall be performed. They confer only that inherent authority which is necessary to secure the proper performance of the end result—that of providing adequate food service for the activity. The law is clear that no employment relationship exists merely because the person for whom the services are being performed has the right to control the end result.

(b) It is appellee's position (1) that appellant has, with the exception of the regulations (C.N.P.I. 66), utterly failed to prove, as it had to duty to do, that the United States had the right to control the means and methods by which appellee performed his services, and (2) that no such control exists in fact.

Appellant's position in this case is analogous to that of a parent corporation seeking to persuade the court that an employee of a wholly or partially owned subsidiary is in fact the parent corporation's employee. Such an argument is, like appellant's here, entirely without merit. No court would accept such an argument and appellee respectfully urges that this court should not.

5. The Government Has Failed to Assume the Burden of Showing that an Employment Status Existed Between It and Appellee.

Although the plaintiff under the Federal Tort Claims Act has the burden of showing that *the tortfeasor was a government employee*, it is clear that a *plaintiff* under this Act *does not have to prove he is not a federal employee*. This is a matter of defense to be pleaded and proved by the defendant. *The record is barren of any attempt on the appellant's part to prove the existence of any of the four common law elements constituting the employment relationship.*

II. The District Court Properly Held That Under the Law of the State of California Liability Would Be Imposed on the United States if It Were a Private Person.

Appellant's specification of error number 3 (Appellant's Brief, page 4) is premised on the theory that the appellee is an employee of the United States. The government's argument rests on the fact that under the express terms of the Federal Tort Claims Act (28 U.S.C. 1346(b)) liability may be imposed on the United States only "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". And, if appellee is an employee of the United States, then under California law appellant would not have any liability to appellee apart from the Workmen's Compensation Act.

Since appellee has already demonstrated that he is not appellant's employee, specification of error number 3 must fall of its own weight. Appellee respectfully refers the court to those arguments and authorities cited under I, *supra*, in support of appellee's contention that he is not an employee of the United States.

III. Should This Court Conclude That Appellee Is a Federal Employee, He May Nevertheless Sue the United States Under the Federal Tort Claims Act.

A. THE DOCTRINE IS WELL SETTLED THAT A FEDERAL EMPLOYEE, BY VIRTUE OF THAT FACT ALONE, IS NOT PRECLUDED FROM SUIT UNDER THE TORT CLAIMS ACT IF THE INJURY "WAS NOT INCIDENT TO OR CAUSED BY" HIS EMPLOYMENT SERVICE.

It is appellee's contention that the clear unequivocal evidence in this case brings it squarely within the doctrine of *Brooks v. United States*, 337 U.S. 49 (1949).

In *Brooks* the plaintiffs, servicemen on leave, were injured on a public highway by the negligence of a government employee driving a government owned truck. The court held that the Federal Tort Claims Act provided a

remedy to servicemen "where the injury was not incident to or caused by their military service". *United States v. Brown*, 348 U.S. 110, 111 (1954). In the present case appellee testified without contradiction that the injury occurred *before* he actually reported for work (Transcript, pages 7-8). In seeking to establish the exact time of the accident, appellee was asked on direct examination, "(Had you) already gone into the kitchen to work?" (Transcript, page 7, line 23). Appellee answered "No." and "Not yet". Since the uncontroverted evidence shows that appellee was injured *before* commencing work for that day, *it is our position that his injury could not have been "incident to or caused by" his employment status.* The accident did not arise from anything connected with his duties as an employee. A case in point is *Knecht v. United States*, 144 F. Supp. 786 (E.D. Pa., 1956), where the court held that an airman killed when returning to his base from leave, was not killed "incident to service". The court held, under the authority of *Brooks v. United States*, 337 U.S. 49 (1949), that a claim for wrongful death would lie against the United States under the Federal Tort Claims Act. Thus, it is clear that where, as here, appellee was going to, but had not yet started nor reported for work, he can not be considered as injured "incident to" his employment.

B. EVEN THOUGH APPELLEE BE CONSIDERED AS A FEDERAL EMPLOYEE ABLE TO SUE UNDER THE TORT CLAIMS ACT, HE IS NOT AN EMPLOYEE WITHIN THE MEANING OF THE CALIFORNIA WORKMEN'S COMPENSATION ACT.

It is clear that a person may be considered as an employee under federal law but not an employee under state law. See *Matcovich v. Anglim*, 134 F.2d 834 (9th Cir., 1943), where the court held plaintiff to be an employer for purposes of federal law even though a California state court had previously held that he was not an employer under

state law. As appellee has already demonstrated under II, *supra*, it is clear that he would not be considered as an employee of the United States under California law. See also *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (D.C. Ill., 1955), where the court declared that the existence of workmen's compensation coverage would not bar an action under the Tort Claims Act by an employee of a non-appropriated fund activity.

C. EMPLOYEES OF NON-APPROPRIATED FUND ACTIVITIES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT.

The court is respectfully referred to the cases of *Comelin v. United States*, 177 F.2d 275 (5th Cir., 1949); *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (D.C. Ill., 1955); and *Falemi v. United States*, 125 F. Supp. 920, discussed in I, A, *supra*.

IV. The Compensation Benefits Provided in 5 U.S.C. 150k-1 Are Not Appellee's Exclusive Remedy Against the United States.

In *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir., 1958), the court relied on 5 U.S.C. 150k-1 in granting the government's motion for summary judgment against an employee of a non-appropriated fund activity. The court held that the employee was precluded from suing the United States under the Federal Tort Claims Act "by the principle . . . that the Act was not intended to grant the right to sue the government to one who has already been provided another remedy against its own instrumentality" (at page 772). The court reached this conclusion in order to effectuate the Congressional policy of providing "a system of 'simple, certain and uniform compensation for injuries or death'" (at page 772). However, in the *Aubrey* case the injury of which the employee complained occurred *subsequent* to the enactment of the statute. In the present case, appellee's injuries

occurred *prior* to the enactment of 5 U.S.C. 150k-1. Thus, at the time appellee's claim arose there was no complete, comprehensive Congressional system, as in *Aubrey*, for providing relief for injured employees of non-appropriated fund activities. Thus, *Aubrey* is inapplicable as the injury there arose after the passage of 5 U.S.C. 150k-1, while appellee's injury arose prior to the enactment. Further, it seems clear that Congress could not, nor did it intend said statute to operate retroactively to bar appellee's existing cause of action under the Federal Tort Claims Act.

CONCLUSION

For the foregoing reason, appellee respectfully submits that the judgment of the court below was proper and correct, and should therefore be affirmed.

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THOMAS M. MULVIHILL

Attorneys for Appellee

No. 16,034 ✓

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a national banking
association,

Appellant,

Appellee.

Petition by Appellee for Rehearing by the
United States Court of Appeals for the Ninth Circuit

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FILED

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In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a national banking
association,

Appellee.

**Petition by Appellee for Rehearing by the
United States Court of Appeals for the Ninth Circuit**

Summary of Position of Appellee

Appellee requests that a rehearing be granted because:

(a) If a right of redemption on the part of the Government is crucial, 28 USC § 2410 may be so construed as to support such a right of redemption after a nonjudicial sale.

(b) The redemption is without real value and the decision of the Court results in a legal paradox by giving a federal tax lien the effect of increasing the rights of the taxpayer.

**If a Right of Redemption on the Part of the Government Is Crucial,
28 USC § 2410 May Be So Construed as to Support Such a
Right of Redemption After a Nonjudicial Sale**

The Court's opinion stresses a point not argued by either side in the briefs or oral argument. The Opinion (Page 8) says:

"In our opinion a compliance with subsection '(c)' is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued."

For the convenience of the court there is attached in the Appendix hereto a copy of the first three paragraphs of Section 2410.

In the first place it should be observed that the statute does not specifically state that a right of redemption is a condition to the filing of suit against the United States. It should also be noted that Subsection (a) refers to mortgages upon real or personal property. The first sentence of Subsection (c) states that a judicial sale in any such action shall have the same effect as may be provided under local law. In a great many cases this would be sufficient to grant the Government a right of redemption if such right were provided for under the local law as to judicial sales. This first sentence certainly refers to both real and personal property. The second sentence states a fundamental rule and the use of the word "sale" without modification

would appear to include both judicial and nonjudicial sales relating to both real and personal property. The third sentence dealing with the right of redemption again uses the word "sale" without modification, but is limited specifically to real property. Each sentence appears to be complete in itself and not interdependent either with any other sentence or with Subsection (a). In view of the fact that in one case a "judicial sale" is specifically referred to and in the second two sentences the word "sale" only is referred to, the statute is susceptible of the construction that the Government would have the right of redemption after any sale, whether judicial or not. This interpretation would justify the conclusion of the trial court as reflected in *United States v. Boyd*, 246 F.2d 477 (1957), *Cert. denied*, 355 U.S. 889, that the Government had a right of redemption and would give meaning to all portions of the statute. Certainly from the standpoint of the Government a statutory provision which is for the protection of the Government should be broadly rather than narrowly interpreted.

The foregoing conclusions as to the separateness and independence of Subsections (a) and (c) appear to be in accordance with the intent of Congress in so far as it can be ascertained. S. Rep. No. 1646, 77th Cong., 2d Sess. (1942), (which accompanied H.R. 5578, the bill which amended Section 2410 in 1942) quotes a letter from Honorable Robert H. Jackson, then Attorney General, to Honorable Hatton W. Summers, then Chairman of the Committee on the Judiciary. After stating that the bill would extend the consent of the Government to be sued to suits to foreclose mortgages and other liens on personal property and expressing the view that no distinction should be made between real and personal property for purposes of consent to be sued, Mr. Jackson's letter continues:

"It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch v. Hamilton* (S.D. Calif.) 33 F. (2d) 224, and *U. S. v. Turner* (C.C.A. 8), 47 F. (2d) 86.

"In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

The bill was reported favorably with the changes recommended by the Attorney General and was enacted with those changes.

Subsection (c) was already a part of Section 2410 when provision was made to permit the United States to be sued in quiet title actions. The change was accomplished by insertion of the words "to quiet title or" in Subsection (a) at the suggestion of the Attorney General. Although mortgages and liens on real property could be foreclosed against the United States, the Attorney General stated there should be a procedure for clearing title where that had not been accomplished in the way already permitted. The Attorney General expressed the view that justice and fair dealing required such an alternative method of clearing real estate titles of Government liens. There is nothing in the legislative history to support the conclusions of the Court in this case; and indeed if the opinion in this case is correct the amendment was meaningless.

Therefore, if the Court here, upon reconsideration, feels that the Government consent to be sued in a quiet title action is conditioned upon the existence of a right of redemption, it may so determine in this proceeding, in which event the judgment of the District Court should be affirmed, but modified to set forth the Government's one-year period of redemption.

It would appear that if the Government has this right of redemption it in effect has all rights that it could possibly obtain through any judicial sale since by paying the amount due the holder of the prior lien, the Government would then have the entire value of the property available to satisfy its claim.

II.

The Right of Redemption Is Without Real Value and the Decision of the Court Results in a Legal Paradox by Giving a Federal Tax Lien the Effect of Increasing the Rights of the Taxpayer

The Court here has announced a new legal concept. It has given a federal tax lien a quality unknown to any other lien,—the power to create some previously non-existing property rights to which the lien can attach.

This paradox, which was pointed out in the dissent in *Metropolitan Life Ins. Co. v. United States*, 107 Fed. 2d 311 (C.A. 6th 1939), cert. denied 310 U.S. 630, is found in the following language of this Court appearing on Page 8 of the Opinion:

“It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress.”

The primary misconception is to refer to a divestiture of the lien. It is the property to which the lien attached that has become non-existent. A lien upon nothing is nothing. What has occurred as a result of the nonjudicial sale is simply a failure or termination of the taxpayer's rights in the property. These rights exist and are defined by State law.

A comparable situation would be where X is a legatee under the will of a decedent. The Government levies a tax lien on the interest of X. The will is contested and it is determined to be invalid and X has no interest. Would the court hold that because of the levy of the tax lien any property rights of X survived and were subject in some way to the lien?

Nowhere does the Court cite any statute or holding that rights created under State law may not also be extinguished under State law where a federal tax lien is involved. The rights of the taxpayer stand or fall under State law and in this case the ownership of the taxpayer in the property was terminated under State law. Thus it is inaccurate to speak of the divestiture or extinguishment of the lien. It is the property which has disappeared, and the quiet title action is the proper procedure to establish that fact.

The Court bases its conclusion in reaching the paradox indicated upon the ground that otherwise the Government would not have its right of redemption. We have already pointed out that the right of redemption can be preserved if the statute is so construed as to require it. However, the right of redemption is actually without value, since it is never exercised, and the Court should reconsider and modify its decision.

WHEREFORE, Appellee respectfully requests that a rehearing be granted by this Court.

Respectfully submitted,

SAMUEL B. STEWART
 GEORGE CHADWICK, JR.
 ELDON C. PARR

Attorneys for Appellee

KENNETH M. JOHNSON

Of Counsel

I, ELDON C. PARR, of San Francisco, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing petition for rehearing in the Case of United States v. Bank of America National Trust and Savings Association, is well founded and is not presented for the purpose of creating a delay.

Date: March 2, 1959,

ELDON C. PARR

(Appendix Follows)



Appendix

Subsections (a), (b) and (c) of 28 U.S.C. § 2410 read as follows:

“(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, [including the District Court for the Territory of Alaska,]* or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

“(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

“(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of

*Bracketed words deleted by amendment of July 7, 1958, Pub. L. 85-508, § 12(h), 72 Stat. 348.

the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises."

No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellers.

OPENING BRIEF OF APPELLANT FAR WEST
ENGINEERING COMPANY, Inc.

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PAUL P. HENNING, CL.



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No. 16040

IN THE

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FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT FAR WEST ENGINEERING COMPANY, Inc.

Origin of the Appeal.

Plaintiffs Craig, *et al.* (hereinafter called "plaintiffs") brought a series of actions against the defendant Far West Engineering Co., Inc. (hereinafter called "Far West") for the difference between overtime and straight time compensation over certain designated periods of

time. [Tr. pp. 312, and 276-277.] The answers set up general denials and certain special defenses, including jurisdiction. [Tr. pp. 13-18.]

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by plaintiffs under Section 1337, Title 38, *United States Code*, and Section 216(b), Title 29, *United States Code*. [See Tr. p. 4.] Should jurisdiction in the District Court be proper, the jurisdiction of this Court on this appeal would lie under Section 1291, Title 28, *United States Code*.

Statement of Facts.

The defendant Far West is and was an engineering company doing design and consulting engineering work in the mechanical, electrical or atomic energy line. [Tr. p. 151.] There is no contest about the fact that the ten plaintiffs were employed by Far West. The individual rates of compensation and the actual hours worked by plaintiffs were established by the payroll records of Far West. [See Exs. A to J.] These varied from \$4.75 to \$3.50 per hour.

The nexus of the controversy concerns the present contention of the plaintiffs that certain hours beyond forty in a given work week should have been compensated at the overtime rate of time and a half rather than on a straight-time basis. [Tr. pp. 1-12.] The defendant, Far West, contended that the subject employees were

exempt, as supervisory or professional personnel, from legislative overtime provisions and that the work done was creative and design activities not in interstate commerce. [Tr. pp. 13-18.]

Specifications of Error.

1. The District Court erred in finding and awarding judgment on the basis of the fact that the subject activities involved were the production of goods in interstate commerce within the meaning of the Fair Labor Standards Act.

2. The District Court erred in failing to dismiss the complaints of plaintiffs Gindes and Linick for wilful failure to comply with the discovery rules of procedure in the court below.

3. The District Court erred in failing to persevere in its initial decision to find against the plaintiffs Morrison, Gindes, Linick, Massar, Gaiennie and Soldis because of their failure to appear at the trial and press their cases.

4. The District Court erred in failing to hold that plaintiffs, as supervisory and professional personnel, were exempted from the overtime provisions of the Fair Labor Standards Act.

ARGUMENT.

A. The Work Here Involved Is Not "Interstate Commerce" Within the Meaning of the Applicable Legislation.

It should be borne in mind that the defendant Far West is not in "interstate commerce" or the "production" of "goods" for or in interstate commerce in any normal sense of the word. The defendant Far West's activities were described without challenge as follows [Tr. p. 151]:

"A. We are an engineering company which does prime or subcontract (14) work, prime contracts for the U. S. Government and subcontracts for the U. S. Government. As prime contractors we do work for industrial plants, consulting, designing, layouts, anything in the mechanical, electrical or atomic energy line."

The work was purely in the nature of design. [Tr. pp. 152, 248-249.] Goods, as such, were not produced, nor were tools or dies to produce the same fabricated; only design and layout work. [Tr. p. 156.] The plaintiffs' own testimony was to the effect that they did or supervised drafting and design work. [Tr. pp. 190-191, 213-214.]

Fundamentally, it may be considered that Congress did not, in the enactment of the Fair Labor Standards Act legislation exert the full measure of its commerce power but instead proposed to leave local business to the protection of the state, thus requiring the observation of the limitation that courts are not free to absorb by judicial process essentially local activities which Congress in the exercise of its judgment did not see fit expressly or by fair implication to bring within the scope of this chapter. *E. C. Schroeder Co. v. Clifton*, 153 F. 2d 385, cert. den. 328 U. S. 858. Courts should not be forced

argument extend congressional enactments beyond their reasonable confines in assertions of interstate commerce. *Jenkins v. Durkin*, 208 F. 2d 941. It was in recognition of such factors that courts have concluded that the work of engineers and architects are not in interstate commerce, nor within the "mischief" sought to be remedied by the Fair Labor Standards Act. Such "plans" and "specifications" are not "goods" in interstate commerce within the meaning of the Act, or in the statutory sense. See, *e.g.*, *McComb v. Turpin*, 81 F. Supp. 86.

It is important to realize that application of the Fair Labor Standards Act to particular employees is not gauged by nearness to or possible implication of interstate commerce. The term "engaged in interstate commerce" as used in the Act is not one merely limited by the power of imagination. *Mateo v. Auto Rental Co.*, 240 F. 2d 831. It is the nature of the employee's work rather than the nature of the employer's business which brings him within or excludes him from the Act. *Johnston v. Cotton Producers Assn.*, 244 F. 2d 553. Thus, even where the employees work on materials *brought in from outside the state* does not mean automatic coverage under the Act. See *Selby v. J. A. Jones Const. Co.*, 175 F. 2d 143; *Collins v. Ford, Bacon & Davis, Inc.*, 71 F. Supp. 229. This principle is true even where the employer engages in interstate commerce or has offices in various states. *Mitchell v. Household Finance Corp.*, 208 F. 2d 667; *Mitchell v. Krout*, 150 F. Supp. 857. It is also true even if the employees are working on a road or a dock from which interstate commerce may be carried on and therefore would facilitate the same. *Koepfle v. Garavaglia*, 200 F. 2d 191; *Nieves v. Standard Dredging Corp.*, 152 F. 2d 719. Thus, auditors traveling across

state lines in auditing branches in various states, but carrying no saleable goods were not considered in the production goods in interstate commerce, even though mailing in reports of their activities. *Mitchell v. Kroger Co.*, 150 F. Supp. 30.

Reviewing the undisputed facts of our present case, what do we have? The performance, supervision, and direction of design engineering and drafting work—all in California and at California facilities by California engineers, generally for a contracting party situated in California. This hardly seems to be “goods” in interstate commerce within the meaning of the Act, and it is submitted that it was error to so hold.

B. The Plaintiffs Philip Gindes and James M. D. Linick, Having Invoked the Jurisdiction of the District Court, but Refusing to Submit to Discovery Under the Federal Rules of Civil Procedure, Should Have Their Actions Dismissed.

The plaintiffs Gindes and Linick filed their actions, but in spite of the most assiduous activities on the part of the defendant, were never subsequently seen through the time of trial, judgment, or appeal. After the commencement of their respective actions, defendant caused the plaintiff Gindes to be *served* with a subpoena *re* deposition [Tr. pp. 90-91] and the defendant Linick to be *served* with a subpoena *re* deposition. [Tr. pp. 117-118.] Appropriate and timely notice of the taking of these depositions was given to opposing counsel. [Tr. pp. 19-21.] Neither the plaintiff Gindes or Linick appeared at the appropriate time and place for the taking of their depositions. An aggravating feature to the situation is that counsel for these two plaintiffs in advance moved

the Court for the protection and delay of these depositions. [See letter to Court, Tr. pp. 98-99, and the oral proceedings before the Court on January 13, 1958, Tr. pp. 137-138.] The Court denied plaintiffs' motions. The defendant, upon the non-appearance of the two subject plaintiffs promptly brought on motions to dismiss under Rule 37(d) F. R. C. P. [Tr. pp. 92-102 and 118.] On January 28, 1958, the Court denied the motions to dismiss "in view of the fact that the case is set for trial on the merits on Feb. 4, 1958, . . . without prejudice to its renewal at the time of trial." [Tr. pp. 109 and 120.]

On February 4, 1958, the subject matters proceeded to trial. Neither of the plaintiffs Gindes or Linick appeared. Virtually at the conclusion of the trial, the trial Court made the following observations:

"The Court: I will tell you something, Mr. Kraker. You (128) have elected not to call these other witnesses. That is your responsibility. But in view of the fact that there is a sharp conflict in the evidence as to what these people did, and in view of the fact that your witnesses have no personal knowledge of the amount of time that these people spent in each category, I must find for the defendant on all cases in which the plaintiffs are not here." [Tr. p. 256.]

"As to Mr. Gindes, although he is not here, the testimony I think is clear that he was acting much more in a professional capacity than probably any of these plaintiffs." [Tr. p. 257.]

After the trial Court's rather amazing change of attitude on February 7, 1958 [Tr. pp. 259-262], the defendant Far West renewed the motions to dismiss against

plaintiffs Gindes and Linick under Rule 37(d) F. R. C. P. [Tr. pp. 109-110, 120.] These motions were summarily denied. [Tr. pp. 112 and 122.]

As pointed out earlier in this discussion, the defendant was clearly and completely prevented from any discovery whatsoever with reference to the plaintiffs Gindes and Linick. It is said, colloquially, that rules are made only to be broken. It would seem, however, that the *Federal Rules of Civil Procedure* are not simply idealistic suggestions but substantive rights in the parties litigant. Rule 37(d), *Federal Rules of Civil Procedure* provides as follows:

“(d) *Failure of Party to Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.”

May plaintiffs, who invoked the jurisdiction of the Federal court, with impunity flout the very discovery principles there established? The Federal courts have previously answered this negatively. See *Fischer v. Dover S.S. Co.*, 218 F. 2d 682; *Peitzman v. City of Illmo*, 141 F. 2d 956, cert. den. 323 U. S. 718. It is submitted that the answer ought to be the same here, in this present flagrant situation.

C. The Evidentiary Situation With Regard to the Plaintiffs Was Insufficient to Sustain a Judgment in Their Favor.

1. As to the Plaintiffs Morrison, Gindes, Linick, Massar, Gaiennie, and Soldis.

These six plaintiffs apparently did not attach sufficient importance to the trial to attend. None were present or gave testimony. At the conclusion of the evidence, the trial judge stated concerning them [Tr. p. 256]:

“The Court: I will tell you something, Mr. Kraker. You (128) have elected not to call these other witnesses. That is your responsibility. But in view of the fact that there is a sharp conflict in the evidence as to what these people did, and in view of the fact that your witnesses have no personal knowledge of the amount of time that these people spent in each category, I must find for the defendant on all cases in which the plaintiffs are not here.”

In view of the evidence adduced, it is difficult to understand why the trial judge changed his mind on the subject. What, then, was the state of the record at the conclusion of the trial as to these plaintiffs? The defendant Far West's payroll records, true enough as heretofore adverted to [Exs. A to J], were introduced, showing the hours worked during the periods in question and the substantial rate and compensation paid plaintiffs. The following is the unchallenged evidence as to each plaintiff:

- a. *The Plaintiff Lynn Morrison.*

Chief engineer of the Airport office of the defendant Far West. He was in charge of all of the work at that office. “He hired and fired.” [Tr. pp. 150-151;

see also Pltf. Ex. 1, p. 29.] His background, qualifications and performance had been observed before designation. [Tr. p. 162.]

b. *The Plaintiff Philip Gindes.*

A supervising engineer. He did administrative and executive work, and kept engineering records. He parceled out the work to the other men, and had the right to hire and fire the men under him. [Tr. p. 145; Pltf. Ex. 1, p. 42.] Various references to his activities appeared in the trial transcript. Probably the trial court's summary concerning him, at the conclusion of the evidence, is illuminating [Tr. p. 257]:

“As to Mr. Gindes, although he is not here, the testimony I think is clear that he was acting much more in a professional capacity than probably any of these plaintiffs.”

c. *The Plaintiff James M. D. Linick.*

A graduate engineer. Selected as a professional engineering supervisor and put in charge of a group of men at the Pico plant. [Tr. p. 147.]

d. *The Plaintiff George D. Massar.*

Experienced in schematics and wiring diagrams. For a short period of time of his employment, worked as a leadman for a small group of draftsmen. [Tr. p. 155; Pltf. Ex. 1, p. 46.] A “leadman” parceled the work out to draftsmen for execution; checking it on its return. [Tr. p. 205.] Massar read engineering drawings and had several draftsmen under his supervision. [Tr. p. 146.]

e. *The Plaintiff Warren L. Gaiennie.*

Liaison engineer between the defendant Far West and Hughes Aircraft. His duties included picking up the work at Hughes, obtaining the technical explanations as to what was to be done, conveying work to Far West, and returning the completed jobs to Hughes. [Tr. p. 150; Pltf. Ex. 1, p. 29.]

f. *The Plaintiff Joseph P. Soldis.*

During the three-week period in question, he supervised the electrical section of the Far West engineering department. His work during the period in question was to distribute the work to the leadmen, keep track of the time spent, and advise and oversee the work to see that it was done properly. [Tr. pp. 148-149.]

The foregoing recitals are not the bare contentions of the defendant Far West. There was no evidentiary conflict as to the professional, engineering, and high-pay status of each plaintiff's position. Yet, with nothing more in the record and after the close of the case, the trial court reconvened the proceedings, stated it had been in contact with the Department of Labor, and subsequently signed findings proposed by plaintiffs. [See Tr. pp. 259-260.] Findings were made as to each plaintiff substantially as follows:

"That plaintiff, having been an hourly employee, the exemptions under Section 13(2)(1) of the Act, or any other provisions thereof, do not apply." [Tr. p. 50. Each plaintiff's case has a similar finding.]

It is probably fair to characterize this finding, particularly in view of the evidentiary posture, as a rather sweeping generalization without support in the law passed by Congress.

2. As to the Plaintiffs Ingildsen, Pyle, Craig, and Clement.

These plaintiffs actually appeared at the trial. Nevertheless, surprisingly little conflict developed in the evidence about the fact of these plaintiffs being skilled, highly paid, supervisory and professional personnel. Here is the evidence:

a. *The Plaintiff Sven Ingildsen.*

Engineer in charge of the Pico office of Far West (except for about two months when he was doing checking work at the Airport office) for about two and a half years. He hired and fired employees, and asked for pay increases for them. [Tr. pp. 144-145.]

Plaintiff Ingildsen, in his testimony, made some effort to minimize his position at Far West, but admitted that he was a graduate engineer and had been a room boss for Far West [Tr. p. 204], and that as such he was in charge of the entire drafting room, and distributed the work which came in "to the different designers, draftsmen, and so forth." Although initially stating that he had little discretion as to hiring and firing personnel, he finally conceded that he did have considerable discretion. [Tr. pp. 213-214; cf., Ex. K.]

The Court said of plaintiff Ingildsen in its trial end summary [Tr. p. 257]:

"With reference to Mr. Sven Ingildsen, I have come to (129) the conclusion that certainly as to the nine months in which he was acting as room boss he is not entitled to recover. As to the two months in which he was performing the same type and character of work which other men did, and in which he testified he was

doing checking work and also some work of the same type and character as the people under him, I am going to allow him to recover for those two months. As to all the previous time, if it is not barred by the statute of limitations, I will take a look at that.”

b. *The Plaintiff Frederick J. Pyle.*

Graduated as an engineer. Was put in charge of a group of electrical designers and draftsmen at Far West. [Tr. pp. 146-147.] Plaintiff Pyle, in his testimony, stated that he had graduated with a B.S. degree in engineering [Tr. p. 199] and while with Far West was a senior engineer or senior designer who would make a layout and ask other draftsmen to do the detail work. [Tr. p. 191.]

c. *The Plaintiff Albert S. Craig.*

Plaintiff Craig testified that he was a graduate engineer. [Tr. pp. 169-170.] He engineered and designed air test equipment at Far West for Hughes Aircraft [Tr. p. 142], and was paid \$3.75 per hour.

d. *The Plaintiff Carl L. Clement.*

Chief project engineer on the Hughes design project. [Tr. p. 143.] He was a graduate engineer, and would obtain the Hughes work and hand it over to the leadmen for performance. [Tr. p. 219.] Plaintiff Clement was somewhat self-effacing about his capacity to the point that the Court remarked, “That is all. I am not impressed with this claim.” [Tr. p. 221.]

The Court characterizes plaintiff Clement’s testimony at the trial’s end as follows [Tr. p. 257]:

“As far as Mr. Clement is concerned, I don’t think the work which he performed, particularly

in view of his frank statements as to the type of work he did would appeal to any court. It certainly doesn't appeal to me, and I am going to deny him recovery."

It is simply appalling to assert that the evidence as set forth recommends itself to any Court as an example of worker exploitation. These were the professional men and supervisors at Far West. No deception as to inflated title-designations is apparent from the testimony. But, in addition look at the distribution averages at Far West in various positions, as requested by plaintiffs during certain years. [See Pltf. Ex. 1, pp. 9-10.] The staff appears in adequate proportions to the type of technical work being done. It is respectfully submitted that the evidence gives no justification for recovery by these plaintiffs.

D. Plaintiffs Were Exempted From the Overtime Provisions of the Applicable Legislation by Reason of Their Status as Supervisory or Professional Employees.

Section 213(a)(1) of the *United States Code* exempts from the wage and hour provisions of the Act "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined by the Administrator)."

Section 541.1 of the regulations issued by the Administrator defined the term "bona fide executive" as follows:

"The term 'employee employed in a bona fide executive * * * capacity' in section 13(a)(1) of the act shall mean any employee—

(a) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; *and*

(b) who customarily and regularly directs the work of two or more other employees therein; *and*

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; *and*

(d) who customarily and regularly exercises discretionary powers; *and*

(e) who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph (e) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; *and*

(f) who is compensated for his services on a salary basis at a rate of not less than \$55 per week (or \$30 per week if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary basis at a rate of not less than \$100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or sub-

division thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section."

Section 541.3 of the regulations issued by the Administrator defined the term "bona fide * * * professional" as follows:

"The term 'employee employed in a bona fide * * * professional * * * capacity' in section 13(a)(1) of the act shall mean any employee—

(a) whose primary duty consists of the performance of work—

(1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, *or*

(2) original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; *and*

(b) whose work requires the constant exercise of discretion and judgment in its performance; *and*

(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; *and*

(d) who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; *and*

(e) who is compensated for his services on a salary or fee basis at a rate of not less than \$75 per week (or \$200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities: *Provided*, That this paragraph (e) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work *either* requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, *or* requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section."

It will be observed that the various plaintiffs fit clearly within the purview of one or the other of the regulations quoted. It might be argued that the plaintiffs were not in the exempt category because they were paid on an hourly basis. [The reason for this, the defendant Far West pointed out, was because its contracts were on an hourly rate basis. Tr. p. 143.] However, the defendant Far West's testimony was to the effect that a guarantee

was given to the individual professional and/or supervisory personnel. [Tr. p. 159.] The four testifying plaintiffs' testimony was not entirely in accord with this, but it is probably fair to assume that there was a guarantee. See plaintiff Pyle's testimony at page 195 of the Transcript.

It should be borne in mind, also, that even in the face of the most extended application of the Administrator's regulations, the interpretative decisions, bulletins, and releases of the Administrator under the Fair Labor Standards Act are to be accorded respect and consideration as informed opinions. However, they "do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U. S. 134, 139. The intent of Congress should clearly govern.

What was the intent of Congress? Fortunately, Congress in the enactment of the subject legislation, made a declaration of intent. Section 202 of the *United States Code* provides:

"(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of worker (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow

of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct, and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Actually, the defendant Far West's testimony was to the effect that there was a conference and a guarantee arrangement given to the supervisory and professional personnel placed on a straight-time basis. [Tr. p. 159.] Plaintiffs appear to deny this, but the plaintiff Pyle's testimony places some equivocation if not denial of this [Tr. p. 195]:

"The Court: What happened then? Were you told that you could work overtime if you waived the overtime rate? A. Yes. And they said that I would be working more hours than 45. Now I couldn't honestly say they did or did not guarantee me any specific number of hours."

The plaintiffs' thesis or apologia may be contained in the rather cynical testimony of plaintiff Craig, who stated [Tr. p. 177]:

"A. Yes. I was told that I would receive \$3.75 an hour. At first I was under the impression that things were supposedly picking up. They were working a 45-hour week at the time, and I was paid time and a half over the 40 hours for the first three weeks. Then I discovered there were men working 60 hours a week and also getting overtime. Well, I began being a little (43) interested. I figured when

I was there already, why shouldn't I work 60 hours, too, and make that much more money. It would have amounted to about \$260, which is not exactly a low salary."

And on page 179 of the Transcript:

"The Court: Compensation at the rate of \$3.75 an hour usually implies some type of skill other than that of an ordinary laborer, doesn't it? A. Not in job shops, sir. If you go out for a job under—well, I hate to use the word 'arrangement,' but in an average company that may be considered high. My rate today is \$800 a month. I mean that is my salary. The only time you can make money in a job shop is in overtime, when they pay you time and a half. When they don't it is foolish to work for them, because (45) you can go out and make the same salary elsewhere. That is exactly what I did.

The Court: You work for \$800 a month now?
A. Yes."

Does the cause here involved recommend itself as one which Congress sought and intended to correct when the Fair Labor Standards Act was enacted? Are these plaintiffs the downtrodden, exploited workmen within the "mischief" Congress sought to correct? Their own testimony nullifies this. Their attitude, even at this late date, in pressing for penalties under the Act against their former employer indicates either animus or a desire to achieve the maximum speculative recovery. It is submitted that an approach such as this destroys and desecrates the benign purpose which Congress had in mind in passing the subject legislation, and which this Court should not permit under the guise of the wooden application of administrative interpretation.

Conclusion.

It is respectfully submitted that the Judgment of the District Court is erroneous and should be reversed with instructions, on the grounds heretofore set forth.

Respectfully submitted,

JULIUS A. LEETHAM,
*Attorney for Appellant, Far West
Engineering Co., Inc.*



No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

OPENING BRIEF ON BEHALF OF PLAINTIFF
APPELLEES-APPELLANTS.

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PAUL G. O'BRIEN, Clerk



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OPENING BRIEF ON BEHALF OF PLAINTIFF APPELLEES-APPELLANTS.

I.

Statement of the Case.

As part of their statement of the case, Plaintiffs adopt, as representative of all causes, the Findings of Fact and Conclusions of Law in Cause No. 1314-57 [R. 44, *et seq.*], excepting only those paragraphs, Paragraph VIII of the Craig Findings, for example [R. 47], which state that Defendant's failure to compensate for employment in excess of forty (40) hours in a workweek at one and one-half times the regular rates was in good faith, together with the consequent failure of the trial court to assess liquidated damages or to include such liquidated damages in determining the attorney's fee.

**Evidence Relating to Defendant's Failure to Pay Time and
a Half for Excess Hours.**

The payroll records of Defendant set forth flat hourly rates and payments based thereon with no consideration given to overtime hours [Deft. Exs. A through J, incl.]. Defendant did not ask for or obtain a ruling from the Department of Labor or any other governmental agency establishing the exempt status of Plaintiffs [R. 266]. Defendant never made any inquiry of any federal agency as to the possible exempt status of Plaintiffs [R. 267]. Defendant, through Hans S. Bamberger, its President, was aware of existing regulations [R. 266].

**Facts Relating to the Order Directing Release of Attached
Funds in Excess of Judgments, and the Misconduct of
Defendant and Its Attorney in Relation Thereto.**

All directly involved facts are contained in the affidavit of William Kraker accompanying the Notice of Motion to Set Aside Order Directing Release of Funds in Excess of Judgments, to Hold Julius A. Leetham in Contempt, and for Attorneys' Fees [R. 71-76, incl.], to which *in toto* the Court's attention is directed.

II. ARGUMENT.

1. In the Absence of Any Showing by the Employer of Both Good Faith and Reasonable Grounds Therefor, an Award of an Equal Amount of Liquidated Damage Is Mandatory.

Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. Sec. 216(b)) provides:

“Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . .”

Under this provision the courts have held that the liability of an employer for liquidated damages equal to its underpayment of required wages is fixed at the time it fails to pay such wages when due, and the courts had no discretion to relieve it of any portion thereof. (See *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697 (1945); *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572 (1942).)

A partial and conditional relief from this liability was provided for by the enactment of Section 11 of the Portal-to-Portal Act of 1947 (29 U. S. C. Sec. 260), which states:

“. . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.”

The conditions of relief from the liability for liquidated damages are spelled out in an Interpretative Bulletin, General Statement as to the Effect of the Portal-to-Portal Act of 1947 (29 C. F. R. Part 790.22(b)(c); 29 U. S. C. App. Sec. 790.22(b)(c)):

“(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) the employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted *prior to or on or after* May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.

“(c) What constitutes good faith on the part of an employer, and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests. Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.”

In its failure to pay overtime compensation at one and one-half the regular hourly rate, Defendant relies solely on the asserted exempt status of its employees as employed in a bona fide executive, administrative, or professional capacity under Section 13(a) of the Fair Labor Standards Act (29 U. S. C. Sec. 213(a)). However, the regulations defining the terms “executive,” “administrative” and “professional,” for the purpose of exemption in each instance, require for inclusion within the definition that the employee be compensated on a *salary or fee basis*. (See 29 C. F. R. Part 541, Secs. 541.100, 541.200, 541.300; 29 U. S. C. App. Secs. 541.1, 541.2, 541.3.)

All Plaintiffs were compensated at an hourly rate. Such employees are clearly not included within the definitions of the above regulations. Defendant was aware of these regulations [R. 266]. Yet, despite the significant language difference, it nonetheless did not ask for a ruling; indeed, Defendant never even made any inquiry of any federal agency as to the possible exempt status of Plaintiffs [R. 266-267]. Not only did Defendant not have reasonable grounds for its conduct, but it necessarily also did not have good faith.

Under the circumstances present here, Defendant could be relieved from the assessment of liquidated damages only if it had obtained an erroneous written ruling, or erroneous written approval, from the Wage and Hour Division. (See Sec. 10 of the Portal-to-Portal Act, 29 U. S. C. Sec. 259.)

2. Under the Rules of Procedure, the District Court Erred, Both in Making Its Order Directing Release of Attached Funds in Excess of Judgment, and in Failing to Set It Aside.

As stated in the Affidavit of William Kraker [R. 72], Plaintiffs' counsel never received the required notice of either the Application for Order Directing Release of Funds or the Order made thereon. (See Rule 5(a), So. Dist. Calif. Local Rules 3(b), 7(a).)

Further, defendant failed to file any instruments or memorandum of points and authorities in opposition to Plaintiffs' motion to set aside said order. Under Southern District California Local Rule 3(d), such failure is deemed to constitute a consent to the granting of said motion.

Still further, Plaintiffs' counsel has never received any notice of the Minute Order denying said motion.

3. Misconduct of Defendant and Defendant's Attorney Is Established, Not Only in Connection With the Sworn Application for the Order Directing Release of Excess Funds, but Also Both Prior and Subsequent Thereto, and Including Misrepresentations at the Hearing on the Motion to Set Aside Said Order.

The facts relating to the misconduct culminating in the obtaining of the Order Directing Release of Attached Funds in Excess of Judgment are set forth in the affidavit of William Kraker [R. 71-76, incl.].

Regarding prior matters, attention is called to Plaintiffs' Brief and Memorandum in Opposition to Motion to Set Aside Defaults, particularly paragraph IV, wherein it was established that Mr. Leetham and/or Mr. Bamberger were deceiving the Court [R. 34-36], and to Plaintiffs'

Brief in Opposition to Motion to Dismiss Under Rule 37(d), Federal Rules of Civil Procedure, in the *Gindes* case, and the accompanying affidavits, wherein it was established that defendant, by Mr. Mayer, its Secretary-Treasurer, indulged in a bald-faced perjury [R. 103-108].

Mr. Leetham's counter-affidavit to the Motion to Set Aside the Order Directing Release of Excess Funds is so utterly improbable as to be unbelievable. In his counter-affidavit he asserts that the dealings on April 2, 3 and 4, 1958, were initiated by William Kraker [R. 80]. He also states [R. 81]:

"The following day, April 3, 1958, Mr. Kraker appeared in your affiant's office with the document which appears as Exhibit 'A' to the Application for Order Directing Release, etc., filed April 7, 1958 (to which reference is made and the same is herein incorporated). Mr. Kraker stated that he had carefully computed the same to include principal, interest, attorney's fees, and costs, less deductions."

At the hearing on the motion Mr. Leetham again asserted:

"No one has denied that the calculations were made by plaintiff."

The above constitutes deliberate misrepresentations by Mr. Leetham, for the initial contact and the initial calculations were necessarily made by him. For example:

(a) William Kraker could not have made the exact computations without Mr. Leetham having first given him the figures, for a Schedule of Deductions from the judgments were, in accordance with the judgments, to be furnished by Defendant. This Schedule was served on Kraker in Mr. Leetham's office after Kraker had already pre-

pared Exhibit "A" [R. 61-63, Plaintiffs' Conditional Order to Release directed to Marshal]. This Schedule was prepared by Mr. Leetham and is dated April 2nd. Thus, Mr. Leetham must have given Kraker all the figures before Kraker appeared in Mr. Leetham's office.

(b) Mr. Leetham must have contacted the Bank of America on April 2nd, and probably prior thereto, and gotten in touch with Kraker thereafter—in order for said Exhibit "A" to have been drawn up.

(c) In the sworn Application for Order Directing Release of Funds itself the fact is unmistakable that Mr. Leetham had a very impelling reason for initiating a release of excess funds [R. 60-61]:

"The attached amounts above and beyond the amounts of the judgments have been pledged to the Director of Internal Revenue, who states that tax liens will be levied against the defendant unless the same is paid on Monday, April 7, 1958. . . ."

4. There Is No Merger of an Attachment Lien of Personal Property in a Judgment Lien.

"In the case of personal property, the recording of an abstract of judgment has no effect, i.e., a judgment lien only covers real property. Hence the attachment lien is not merged and remains. (*Balzano v. Traeger* (1928), 93 C. A. 640, 643, P. 249.)"

1 *Witkin*, Cal. Proc., Sec. 82, Judgment for Plaintiff, p. 916.

"The doctrine of merger of attachment and judgment liens applies only to cases where real property has been attached, since a judgment does not become a lien upon personal property although it has been attached. In such a case, the attachment lien con-

tinues after judgment to preserve the lien and its priority and to allow the issuance and levy of execution under the judgment.”

6 *Cal. Jur.* 2d, Sec. 135, Merger of Lien and Judgment, p. 44.

5. **Setting Aside of the Order Will Effect the Result to Which Plaintiffs Are Entitled Only if the Court Requires Mr. Leetham to Deposit Into Court an Amount of Money Equal to the Amount Heretofore Released.**

The basis of plaintiffs' appeal is the failure of the trial court to assess defendant an equal amount in liquidated damages, or an additional \$6,760.16. (This figure does not include a duplication of court costs.) Since this is a penalty rather than wages, plaintiffs are entitled to the entire amount without deductions for any payments for taxes, etc., to be made directly by defendant. Thus, plaintiffs are entitled, in addition to the \$5,366.33 on deposit in court, to the further security of \$6,760.16, and interest thereon from March 24, 1958, and interest from March 24, 1958 on the \$5,366.33 on deposit in an amount sufficient to cover the period of appeal, plus costs and attorneys fees on appeal. These figures total, conservatively, an additional \$9,000.00. The amount released from attachment pursuant to the Court's order is approximately that amount.

It definitely appears that defendant is now insolvent and would be unable to respond to a new attachment restoring plaintiffs to their previous security, either in total amount or in priority. Because the impairment of plaintiffs' rights was occasioned by Mr. Leetham's misconduct, it is only appropriate that the Court require Mr. Leetham personally to deposit into court at least \$9,000.00 so as to restore plaintiffs to their original secured position.

The Court has the power to make this requirement of Mr. Leetham under Rule 60(b), which states:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.”

6. Defendant's Acceptance of the Benefits of Exhibit "A", the Conditional Order to Release, Constitutes a Waiver of Its Right to Appeal.

Exhibit "A" [R. 61-63] is referred to as Exhibit X in the affidavit of William Kraker setting forth all the circumstances relating to it [R. 71-76], wherein it is stated [R. 74] that Exhibit "A" (which is only a copy) was conditionally delivered to Mr. Leetham, one of the conditions being Defendant's acceptance of the various judgments. Mr. Leetham in his sworn Application for Order Directing Release of Funds in Excess of Judgments and Directing Deposit of Funds in Registry of Court Pending Satisfaction, admits at least this much [R. 60]: that Kraker would not proceed in the manner contemplated (via Exhibit "A") unless Defendant spelled out its surrender of its right to appeal. Nonetheless, while refusing to spell out Defendant's surrender, Mr. Leetham acted on Exhibit "A" and obtained a court order thereon. By Mr. Leetham's action Defendant has accepted certain benefits. That the benefits are substantial appears from Mr. Leetham's aforesaid sworn Application [R. 60-61]. It is hornbook law that the acceptance of substantial benefits necessarily waives the right to appeal.

Conclusion.

It is submitted that Plaintiffs are each entitled to an additional equal amount in liquidated damages, and that Mr. Leetham be required to respond personally to the extent that Defendant may be unable to satisfy the entire amounts of the judgments as they may finally be determined.

Respectfully submitted,

WILLIAM KRAKER,

Attorney for Plaintiffs.

No. 16040
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

Brief of Defendant Far West Engineering Company,
Inc., as an Appellee.

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FAR WEST ENGINEERING COMPANY, INC., a corporation,

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vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

Brief of Defendant Far West Engineering Company,
Inc., as an Appellee.

Prefatory Comment.

One of the customary offices of an appellant's opening brief is to outline the facts and the probable jurisdictional status of the cause. It would seem that in the most generous evaluation of pages 1 and 2 of the opening brief of appellants Craig, *et al.* they have not done so. Therefore, this Court's attention is respectfully invited to the defendant Far West's opening brief as an appellant, heretofore filed, and pages 1 through 3 thereof, which probably concisely presents the situation of the present controversy.

A technique utilized in some circles in past days when litigating a weak case was to literally “try” the opposing attorney rather than the case. This method is apparently being again attempted on behalf of the appellants Craig, *et al.* Less than nine pages are contained in the “Argument” section of the opening brief of appellants Craig, *et al.*, of which approximately six pages (pp. 6 to 11), or two-thirds of the “Argument,” is devoted principally to personal attacks on the writer of this brief. In the subject pages, this writer’s *name* is mentioned *twenty-one* times in contextual characterizations including “deceiving the Court,” “unbelievable,” “deliberate misrepresentations,” and “misconduct.” This writer, although of the opinion that many of the points raised are not properly points on appeal here, will nevertheless dispassionately answer in the following pages every point raised. However, this writer wishes to respectfully protest to this Court a procedure highly likely to injure this writer professionally, but because of its privileged form, offers little opportunity of redress except perhaps the possibility of admonishment by the Court. In this connection, perhaps it is fair to point out that as counsel for the appellants Craig, *et al.* apparently concedes, it is he (and not this writer) who is under investigation by the State Bar [Tr. p. 41], although we are given his reassurance that:

“Affiant has in fact acted with all propriety, and the United States Department of Labor attorney, with a special competence in employees quasi-class actions affirms the propriety of affiant’s conduct.”
[Tr. p. 41.]

The presentation in this response follows, as closely as possible, the points raised by the appellants Craig, *et al.*

ARGUMENT.

- A. The Finding of the Trial Court That the Employer-Appellee, Far West, Had Acted in Good Faith in the Payment of Its Employees Is Amply Supported by Evidence and Justified in the Law.

Testimony was received during the course of the trial that the defendant Far West had discussed the status of the plaintiff employees or parallels with the Wage and Hour Division of the Department of Labor, and had been orally advised that they were exempt. Furthermore, that the defendant Far West had relied on this verbal ruling. [Tr. pp. 164-168.]

The trial court had a rather amazing change of attitude between the date of trial, February 4, 1958 [Tr. pp. 256-259], and February 7, 1958, after it had been in contact with the Department of Labor. [Tr. pp. 259-262.] Even so, the trial judge stated on the latter date:

“The only testimony in the case indicates that Mr. Mitchell suggested that these people were not covered by the act, and I am going to accept that. I am not going to allow damages in this case.” [Tr. pp. 260-261.]

The Findings of Fact prepared and submitted by plaintiffs in the case of each plaintiff contained a finding substantially as follows:

“VIII.

“That defendant’s failure to compensate Craig for such employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half ($1\frac{1}{2}$) times the regular rates at which he was employed was in good faith.”

The appellants Craig, *et al.* correctly point out that under Section 260 of *United States Code*, it is provided that the court may in its sound discretion withhold the awarding of damages if shown to its satisfaction that the employer acted in good faith and had reasonable grounds to believe that his act or omission was not a violation of the Fair Labor Standards Act. They go on to argue, however, a quite different proposition, viz., that the courts are bound by certain conditions set out in an "Interpretative Bulletin, General Statement as to the Effect of the Portal-to-Portal Act of 1947."

Fortunately, this suggested emasculation of judicial function is not the law. Failure to obtain *written* ruling from the Administrator of the Wage and Hour Division of the Department of Labor is simply not conclusive against the employer. The matter of good faith is one of judicial discretion. *General Electric Co. v. Porter*, 208 F. 2d 805; *Van Dyke v. Bluefield Gas Co.*, 210 F. 2d 620.

B. The District Court Acted Properly in Its Orders Subsequent to Judgment With Regard to Attached Funds.

Although appellants Craig, *et al.* appear to have listed five points of their "Argument" (Secs. 2 to 6) in connection with the above, inferentially if not logically, their attack is on the foregoing proposition. Initially, their appeal in this matter is highly questionable. The Order of the District Court complained of was that dated April 7, 1958. [Tr. pp. 63-64.] Judgments were entered in the various causes on March 24, 1958. [Tr. pp. 57-59.]

Appellants Craig, *et al.* have only one notice of appeal in the record. It appears at page 65 of the Transcript, and is as follows:

“NOTICE OF APPEAL.

“Notice Is Hereby Given that plaintiffs in each of the above entitled consolidated actions hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in each of these actions on March 24, 1958.

“Dated: April 22, 1958.”

Rule 73(b), *Federal Rules of Civil Procedure*, provides in part: “The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.” Although appellants Craig, *et al.* moved to set aside the Order of April 7, 1958, by notice dated May 1, 1958 [Tr. p. 71; see Counter-Affidavit, Tr. p. 79, *et seq.*], no appeal from the Order of April 7, 1958 was filed within thirty days of its making, of its partial denial on May 12, 1958 [Tr. p. 85] or of its complete denial after submission on May 26, 1958. [Tr. p. 127.]

The Court of Appeals may consider only the order, judgment, or portion thereof designated by the appellant in the notice of appeal. It might well be said in connection with the subject Order of April 7, 1958 that “. . . the regularity of the process and the merits of the matter were not brought to this court for review.” *Carter v. Powell*, 104 F. 2d 428, 430, cert. den. 308 U. S. 611.

In the event, however, that this Court should feel the appellants Craig, *et al.* did properly take an appeal in this matter, the following answers are made to the contentions advanced by them:

1. The District Court Did Not Err Under Its Own Rules or Under the Rule of Civil Procedure.

A charge is made by the appellants Craig, *et al.* that the Order of Court made April 7, 1958, was invalid for an asserted lack of notice. Even assuming a lack of notice, presumably the appellants Craig, *et al.* are urging the novel proposition that a District Court is powerless to act *ex parte*. This contention would certainly seem to emasculate Rule 77(b), *Federal Rules of Civil Procedure*, which provides in part:

“(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trial upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place wither within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.”

This seems to be in conformity with Local Rule 3(2)(g), Southern District of California.

Appellants Craig, *et al.* correctly state the provisions of Local Rule 3(d), Southern District of California as to the absence of a counter-showing to a motion, but seem to overlook that such a counter-showing was actually made. [See Tr. pp. 79-84.] Furthermore, it would seem, analytically, that the District Court should be one of the best judges of its own rules.

If plaintiffs' counsel has never received any notice of the minute Order of May 26, 1958 [Tr. p. 127], as is asserted, it does seem surprising that he designated it in his Designation to this Court dated June 13, 1958. [See Tr. p. 271.]

C. Appellants Have "Established" No "Misconduct" or "Misrepresentations" on the Part of Defendant and Defendant's Attorney.

It is rather difficult to sort out the assorted material included in the brief of appellants Craig, *et al.* in connection with the asserted "Misconduct of Defendant and Defendant's Attorney."

Our attention is invited to an affidavit of plaintiffs' counsel which is attached to a notice of motion set for May 12, 1958. [Tr. p. 70.] Two counter-affidavits were filed to this motion. [Tr. pp. 79-84.] A hearing was actually held on May 12, 1958, in which the motion to hold in contempt was denied, presumably because plaintiffs could not sustain the charges made. [Tr. p. 85.] Although a Court Reporter was present, plaintiffs did not designate this as part of the record. Probably, we are justified in presuming that the conflicting presentations made in Court on May 12, 1958 justified the Court in determining contrary to plaintiffs' contention, which it did. [Tr. p. 85.] This seems to be the law. Appellate Courts customarily do not substitute their own judgment for that of the trial court in discretionary rulings as to setting aside the trial court's own orders or judgments. *Atchison, Topeka & Santa Fe Ry. Co. v. Barrett*, 246 F. 2d 846.

D. Requiring Defendant's Attorney to Personally Deposit \$9,000.00 Into Court Cannot Be Justified in Either Law or Fact.

Close attention has been given to the arguments made by appellants Craig, *et al.* that this writer *personally* deposit \$9,000.00 into Court. In view of the factual considerations and undisputed determinations made in the trial court, as heretofore discussed in the preceding section and elsewhere in this brief, it is simply impossible to grasp the rationale.

To support this argument, appellants Craig, *et al.* merely refer us to Rule 60(b), *Federal Rules of Civil Procedure*. This Rule does provide that a District Court may relieve a *party* of an order for certain specified reasons. Probably the Court could give some consideration to the appropriateness of remedies not originally a part of the judgment or order. *Nichols v. Alker*, 235 F. 2d 246. But to impose a substantial personal penalty upon a non-party to the litigation, as here requested, would seem as legally baseless as the plaintiffs requesting this Court to require the District Court judge to deposit this money—because he decided against plaintiffs Craig, *et al.* in the particular matter.

E. The District Court Has Inherent Power Over Its Own Process and May Make Appropriate Orders Applicable Thereto, Particularly Where the Status of Attached Funds Has Been Defined by Judgment.

In an action where attachment is used, the law of the jurisdiction in which the District Court convenes is applicable to this summary process. Rule 64, *Federal Rules of Civil Procedure*. To consider the argument of appellants Craig, *et al.*, two factors are important:

1. The Nature of the Lien Created by Attachment Is an Inchoate or Contingent One, Wholly Dependent on the Judgment.

A great deal of legal research time may be eliminated if there is a fundamental conception of what is the nature of an "attachment lien." It was unknown in the early common law. A suitor's rights against the defendant arose from the judgment only. The judgment creditor had the right to execution, as a remedy in aid of the judgment, against "that which the defendant had on the day of judgment rendered." *John's Case*, K. B., 31 Edw. I., A. D. 1303, Y. B. 30 and 31, Edw. I., p. 322. Because of the harsh consequences which sometimes occurred, *e.g.*, the disposition of assets prior to judgment, rights to a writ of attachment have been commonly provided by statute. Section 537 of the *California Code of Civil Procedure* is typical, and is procedurally applicable in the present instance.

The purpose of the attachment writ, then, is merely to hold a certain priority on the attached property pending a determination by judgment. The Supreme Court of California has stated that, "The attaching creditor obtains only a potential right or a contingent lien. . . ." *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 412. The Supreme Court of the United States, in recently reviewing the attachment law of California, made this observation:

" . . . if the state court itself describes the lien as inchoate, the classification is 'practically conclusive.' *Illinois v. Campbell*, 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissegur v. Yarbrough*, 29 Cal. (2d) 409, 412; 175 P. (2d) 830, 831, by stating that, 'The attaching creditor obtains

only a potential right or a contingent lien’ Examination of the California statute shows that the above is an apt description. . . . Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.” *United States v. Security Trust & Savings Bank*, 340 U. S. 47, 50.

The appellants Craig, *et al.*, urge that there is no merger of an attachment lien in a judgment lien. This Court seems to have reached a different conclusion. In *Ward v. C. I. R.*, 224 F. 2d 547, this Court stated at page 551:

“This attachment is merely a *sequestration* of the debtor’s funds to abide the judgment. They still remain the property of the debtor and title to them passes to the attaching creditor *only* after a judgment in his favor has been entered, in which case the lien of the attachment is *merged* into that of the judgment.”

2. Had Plaintiffs Desired to Preserve an Inchoate Lien Larger Than the Judgment They Secured, the Law Provides a Procedure Which They Did Not Follow, and Thus Cannot Complain in Having Lost Statutory Lien Rights.

Finally, there is a congenital statutory difficulty in plaintiffs’ contentions concerning attachment liens under the California law. Plaintiffs’ claims in their lawsuits totaled around \$14,000.00. Judgments were recovered in the neighborhood of \$6,000.00. Certainly it takes no legal argument to demonstrate that as to the difference between the claims and the judgments, the defendant was the successful litigant.

How does the unsuccessful plaintiff in California preserve his attachment lien on appeal? Section 946 of the *Code of Civil Procedure* provides, as in part:

“ . . . An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant . . . ; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected.”

If no appeal is effected *and stay bond posted* within the statutory time, the attachment is discharged. Section 553, *Code of Civil Procedure*. Section 946, *Code of Civil Procedure*, making appeal ineffective to continue attachment in force unless an undertaking is filed, applies also to an appeal by plaintiff from a judgment deemed inadequate. *Stockton Theatres, Inc. v. Palermo*, 47 Cal. 2d 469.

F. Compliance With an Order of Court by Defendant Does Not Effect a Surrender of Its Appellate Rights.

Appellants Craig, *et al.* argue that the defendant Far West should have no right to appeal because of an asserted “waiver.” Ordinarily, if an argument of this character can be made, it would seem that it should be made as a response to the cross-appeal actually presented (on which the defendant Far West has already filed its opening brief), rather than as a part of the appellants Craig, *et al.* appellate case—on which it can have no conceivable effect, except perhaps psychologically. Although the defendant Far West hesitates to burden this Court with a possible repetitive argument, prudence dictates that a short comment be made in the event the plaintiffs Craig, *et al.* elect not to file a response to the cross-appeal of the defendant Far West.

Aside from all controversy as to motives and purposes, the fact remains that what the defendant Far West has done is deposit the total monies found due under the judgment, *pursuant to express Order of Court* [Tr. pp. 63-64] into the Court registry. Aside from the contingencies which the appellants Craig, *et al.* now seem to urge, the fact remains that the Order of Court was based upon and conforms exactly in amounts to a document prepared by counsel for appellants Craig, *et al.* [Tr. pp. 61-63.] This latter document was approved by defendant Far West's counsel on the express written reservation "Approved and Agreed to, to avoid the necessity of execution." To employ an introductory phrase of appellants Craig, *et al.*, "it is hornbook law that" the payment of a judgment by a defeated party, particularly where it is done to avoid the necessity of execution, as here, does not constitute the waiver of rights of appeal. *Dakota County v. Glidden*, 113 U. S. 222, 224; *Puget Sound Nav. Co. v. Nelson*, 59 F. 2d 697; *The Barge No. 25*, 14 F. 2d 107.

Conclusion.

The appeal of the appellants Craig, *et al.*, being founded in neither law nor equity, should be denied.

Respectfully submitted,

JULIUS A. LEETHAM,

*Attorney for Defendant Far West Engineering
Co., Inc., as Appellee.*

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Answering Brief of Plaintiffs Appellees-Appellants.

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Appellees.

Answering Brief of Plaintiffs Appellees-Appellants.

ARGUMENT.

1. The Work Here Involved Is Clearly Interstate
Commerce.

That Hughes Aircraft Company is engaged in interstate commerce is admitted [R. 244]. Each of the plaintiffs spent all or a substantial portion of his time at drafting or design work intended for Hughes Aircraft Company. These drafts and designs, for example, were for electronic and electromechanical mobile test equipment to be

sent to Tucson, Arizona, and Holloman Air Force Base, and all over the world for the Air Force to use in checking missiles [*e.g.*, R. 223-224].

Apparently, it is Defendant's contention that drafts and design are not "goods," and that therefore the Fair Labor Standards Act does not come into operation at all, regardless of the fact that interstate commerce is otherwise involved.

"Goods," as defined by Section 3(i) of The Act (29 U. S. C., Sec. 203(i)) means "goods . . . , wares, products, commodities, merchandise, or *articles or subjects of commerce of any character, or any part or ingredient thereof, . . .*" (Italics supplied.) The range and nature of articles which may be considered as "goods" under this sweeping definition is virtually unlimited.

Defendant's counsel, at page 5 of its Opening Brief, cites *Collins v. Ford, Bacon & Davis*, 71 Fed. Supp. 229 (D. C. Pa., 1946), as supporting Defendant's position. The facts in that case were wholly different, however, and that court offers the dictum, precisely applicable to the facts present here, at page 230:

"Plans, designs and letters by which information is transmitted can be considered 'goods' only when the plans themselves or the information contained in the letters is the thing which the employer sells and his customers buy."

Similarly, Defendant, at page 5 of its Opening Brief, cites *McComb v. Turpin*, 81 Fed. Supp. 86 (D. C. Md., 1948), where the facts again are quite different. And here, too, that court, at page 89, offers the reasoned dictum in support of Plaintiffs on the facts present here, and it quotes the above quoted *Ford, Bacon & Davis* case dictum.

None of the other cases cited by Defendant even remotely bears on the facts present here.

As opposed to Defendant's cited cases, the dictum at page 790 in *Bozant v. Bank of New York*, 156 F. 2d 787 (C. A. 2d N. Y., 1946) is particularly persuasive:

"In so far as the Bank's business consists of preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like, it is engaged in 'producing goods for commerce'; and included in this are any activities necessary to the effectiveness of the documents even though, as an example, it be no more than registering a share or a series of bonds. On the other hand the mere writing of letters or the drawing of papers, which have no value of their own except as records, are not to be counted."

In any event, Defendant's counsel leads us astray as he attempts to confine argument to the question of "goods." The inquiry into the applicability of The Act is more properly directed to the word "produced," which is defined in Section 3(j) of The Act (29 U. S. C., Sec. 203(j)) as:

" . . . produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in and closely related process or occupation directly essential to the production thereof, in any State.*" (Italics supplied.)

The drafts and designs involved here are indisputably a “closely related process or occupation essential to the production” of Hughes Aircraft Company goods, which in turn are admittedly in interstate commerce. Under the provisions of the above subparagraph it is not even a requirement that the drafts and designs ever move across any state lines.

While there is a wealth of authority generally in support of Plaintiffs’ position, counsel has found only one case precisely in point. *McComb v. Eimco Corp.*, 83 Fed. Supp. 635 (D. C. Utah, 1949), holds that employees in the engineering department of a manufacturer of filters and mining equipment, engaged in the designing of filters and in the detailing of those designs, were “engaged in the production of goods for interstate commerce and in processes and occupations necessary thereto” (p. 638).

2. Defendant Being in Default at the Time, Plaintiff Gindes Was Not Properly Served With a Subpoena Re Deposition.

The default of Defendant in the Gindes case was properly entered by the Clerk on December 31, 1957 [R. 24]. A Subpoena *re* Deposition was served on Gindes on January 7, 1958 [R. 91]. The default of Defendant was not set aside by the Court until January 13, 1958 [R. 131], and no service of process was thereafter made by Defendant on Gindes.

3. The Court Has Properly Exercised Its Discretion in Denying Defendant's Motions to Dismiss for Failure of Gindes and Linick to Appear for Their Depositions.

On January 28, 1958, the Court denied Defendant's motions to dismiss under Rule 37(d) without prejudice to renewal of the motion at time of trial [R. 120]. On April 4, 1958, the Court denied Defendant's renewed motions made after trial and entry of judgment [R. 122].

Even if there had been some facts properly discoverable from Gindes and Linick, they had good and sufficient reason for being excused from the taking of depositions at the time scheduled, as appears in the Brief in Opposition to Motion to Dismiss and the supporting affidavits [R. 103-108].

Moreover, there was nothing in fact discoverable from Gindes or Linick, considering the basis on which the Court rendered its judgment. Plaintiffs accepted Defendant's payroll records [Deft. Exs. A-J], which set forth the hours worked, the earnings, and the fact that Plaintiffs were each employed and paid at hourly rates. It was never disputed that each of the plaintiffs worked a substantial portion of his time on drafts and designs for Hughes Aircraft Company, which was clearly engaged in interstate commerce. Thus, no evidentiary facts were ever really in issue. The two issues remaining are purely matters of law: (a) whether drafts and designs are "goods" in interstate commerce, and (b) whether Plaintiffs are necessarily covered by the time-and-a-half benefits of the Fair Labor Standards Act because they were paid on an hourly basis.

4. There Was No Guaranteed Compensation Arrangement Excepting Defendant From Overtime Rate Principles.

Defendant had no flat salary or fee arrangement with Plaintiffs and thus does not come within the exemptions of Section 13(a) of the Fair Labor Standards Act (29 U. S. C., Sec. 213(a)), as defined by the Administrator in 29 C. F. R., Part 541, Sections 541.100, 541.200, 541.300.

Defendant, at page 19 of its Opening Brief, asserts that there was a guarantee arrangement but at the same time admits that Plaintiffs deny this. The Court has accepted the Plaintiffs' testimony, which, in turn, is further supported by the payroll records [Deft. Exs. A-J]. Moreover, even if there had been a guarantee of, say, forty-five hours weekly to hourly rate employees, this would not convert Plaintiffs into employees on a salary or fee basis.

Rather, the inquiry is to the possible application of Section 7(e) of The Act (29 U. S. C., Sec. 7(e)), which provides:

"No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6(a) and compensation at not less than one and one-half times such rate for all hours worked in

excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.”

But there is neither such a bona fide individual contract or such a collective bargaining agreement nor, indeed, any testimony relating thereto.

Conclusion.

It is submitted that Plaintiffs are each entitled to an equal amount in liquidated damages, and that Mr. Leetham be required to respond personally to the extent that Defendant may be unable to satisfy the entire amounts of the judgments as they may finally be determined.

Respectfully submitted,

WILLIAM KRAKER,

Attorney for Plaintiffs Appellees-Appellants.

No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

REPLY BRIEF OF FAR WEST ENGINEERING
COMPANY, INC. AS AN APPELLANT.

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No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

REPLY BRIEF OF FAR WEST ENGINEERING COMPANY, INC. AS AN APPELLANT.

Introduction.

The "Answering Brief of Plaintiffs Appellees-Appellants" Craig, *et al.*, deals with only three of the four topics raised in the "Opening Brief" filed on behalf of Far West as an appellant. For this reason, this discussion will be confined solely to the three points raised.

ARGUMENT.

A. The Work Here Involved Is Not "Interstate Commerce" Within the Meaning of the Applicable Legislation.

The essential factual contentions set forth in the Opening Brief of Far West (Op. Br. pp. 4-6) remain unchallenged. Thus, it is undisputed that what we are here considering is the performance, supervision, and direction of design engineering and drafting work—all in California and at California facilities by California *engineers*. Goods, as such, were not produced, nor were tools or dies fabricated to produce the same.

By way of argument, following the technique heretofore established, our attention is called to this writer with the following phrasing: “. . . Defendant's counsel leads us astray as he attempts to . . .” Two cases, cited by defendant Far West in its opening brief, *Collins v. Ford, Bacon & Davis*, 71 Fed. Supp. 229, *McComb v. Turpin*, 81 Fed. Supp. 86, are described as having different facts than the present case. Yet no attack is made on the fundamental propositions these cases, among others, were cited to support. For clarity, let us review the logical sequence of the propositions advanced by the defendant Far West, as an appellant, in its opening brief, with a portion of the authority cited:

1. Congress did not, in the enactment of the Fair Labor Standards Act (29 *United States Code*, Section 201, *et seq.*) exercise the full measure of its commerce power, but instead proposed to leave local business to state regulation.

E. C. Schroeder Co. v. Clifton, 153 F. 2d 385.

2. Courts should not by forced argument extend congressional enactment beyond their reasonable confines in assertions of interstate commerce.

Jenkins v. Durkin, 208 F. 2d 94.

3. Nearness to or possible implication in interstate commerce is not the test. The term "engaged in interstate commerce" as used in the Act is not one merely limited by the power of imagination.

Mateo v. Auto Rental Co., 240 F. 2d 831.

4. It is the nature of the employee's work rather than the nature of the employer's business which brings him within or excludes him from the Act.

Johnston v. Cotton Producers Assn., 244 F. 2d 553.

(a) Even in cases where the employees work on materials brought in from outside of the state, coverage is not automatic.

Selby v. J. A. Jones Const. Co., 175 F. 2d 143.

(b) Nor is coverage automatic because the employer engages in interstate commerce or has offices in various states.

Mitchell v. Household Finance Corp., 208 F. 2d 667.

(c) Nor is coverage automatic even if employees are working on a road or dock from which interstate commerce may be carried on and therefore would facilitate the same.

Koepfle v. Faravaglia, 200 F. 2d 191;

Nieves v. Standard Dredging Corp., 152 F. 2d 719.

- (d) Nor is coverage automatic even where employees cross state lines to perform their duties.

Mitchell v. Kroger Co., 150 Fed. Supp. 30.

To the foregoing analysis, itself, the plaintiffs Craig, *et al.*, make no reply, but content themselves with a critique of defendant Far West's "apparent" usage of certain words, such as "goods" and "produced." Actually, the cause here is not a problem in semantics, and it is surprising to see it approached from such an angle. The undisputed, unchallenged summary of the work and duties of the plaintiffs is given in Section C of defendant Far West's opening brief. (See Far West's Op. Br. pp. 9-14.) Reference to the payroll records will show them all highly paid employees. [Exs. A through J; *cf.*, Tr. p. 177.] All had professional qualifications and either did or supervised the doing of design engineering. The work performed was done solely in California. One plaintiff only, Carl L. Clement, would from time to time travel to Tucson, Arizona to pick up work or papers or to return completed work for Hughes, Tucson. Of Mr. Clement, at the conclusion of his own testimony, the trial judge remarked [Tr. p. 224]:

"The Court: I suggest that you have the other people. I will tell you, I am not going to allow this man anything, because I can't see how this man would be entitled to one penny. Do you think so under the testimony he has given? You are just wasting my time and wasting your own time wasting this man's time."

The Department of Labor cited the decision of *McComb v. Turpin*, 81 Fed. Supp. 86 in its Interpretative

Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, *Code of Federal Regulations* (776.19(b) (2)), saying:

“On the other hand, the legislative history makes it clear that employees of a ‘local architectural firm’ are not brought within the coverage of the Act by reason of the fact that their activities ‘include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce.’ Such activities are not ‘directly essential’ enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a ‘local’ firm.”

In a somewhat broader sense, the Supreme Court, in declaring maintenance employees in a building including a large number of tenants in interstate commerce as exempt from the provisions of the Fair Labor Standards Act, stated (*10 East 40th Street Building, Inc. v. Callus*, 325 U. S. 578, at page 583):

“Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by these considerations pertinent to the Federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because of manu-

facturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the state and federal authority, when Congress has cast the duty of making them upon the Courts. Our problem is not an exercise in scholastic logic."

B. The Plaintiffs Philip Gindes and James M. D. Linick, Having Invoked the Jurisdiction of the District Court, but Refusing to Submit to Discovery Under the Federal Rules of Civil Procedure, Should Have Their Actions Dismissed.

Here, again, there is no dispute in the factual situation. The plaintiffs Craig, *et al.* occupy about a page and one half of their answering brief in regard to this general subject, but they leave unanswered the question the defendant Far West posed in its opening brief: May plaintiffs, who invoked the jurisdiction of the Federal Court, with impunity flout the very discovery principles there established? Perhaps they intended to answer inferentially in the affirmative. As set in defendant Far West's opening brief (Op. Br. pp. 6-8) at greater length, these are the undisputed facts:

1. Both plaintiffs, Gindes and Linick, were served with a subpoena *re* deposition. [Tr. pp. 90-91, 117-118.]

2. Timely notice of the taking of these plaintiffs depositions was given to opposing counsel. [Tr. pp. 19-21.]

3. Counsel for these two plaintiffs moved the District Court for protection and delay of the deposi-

tions [Tr. pp. 98-99, 137], which motions the Court denied on hearing, stating:

“I think if the plaintiffs come here and want the process of this court they had better be prepared to submit to its processes.” [Tr. p. 138.]

4. The plaintiffs Gindes and Linick did not appear for the taking of their depositions. [Tr. pp. 92-102.]

5. Defendant Far West’s motion to dismiss the two plaintiffs was “denied without prejudice to its renewal at the time of trial.” [Tr. pp. 109, 120.]

6. Neither plaintiff, Gindes or Linick, appeared at the time of trial, their counsel there reporting [Tr. p. 224]:

“Mr. Kraker: Mr. Gindes is on defense work in Philadelphia. He should be back within a few days. . . . Linick is not available.”

7. Defendant Far West’s renewed motions to dismiss plaintiffs Gindes and Linick [Tr. pp. 109-110, 120] were summarily denied by Judge Solomon. [Tr. pp. 112, 122.]

Such a recital makes a mockery of discovery proceedings. Here the defendant Far West, in spite of the most diligent efforts, was unable to examine the plaintiffs Gindes and Linick from the time of filing of complaint through judgment. Without citation of authority, the plaintiffs Craig, *et al.*, give two justifications, viz., a default in the Gindes case, and “there was nothing of fact discoverable from Gindes or Linick, . . .” Both the record and common sense dispute these propositions.

I.

The Gindes Case Was Never Properly in Default but in Any Event the Facts Do Not Justify Plaintiff's Ignoring Court Process.

Even though within ten days of a determination on a motion to dismiss, default was applied for in the Gindes case. [Tr. pp. 21-24.] Noting the attempt made to obtain default, the defendant Far West moved to set aside the same promptly. [Tr. pp. 25-30.] Hearing was held on this motion and determination in favor of defendant Far West's position was made on January 13, 1958 [Tr. p. 43], and before the scheduled appearance of the plaintiff Gindes pursuant to *notice and subpoena* on January 14, 1958. [Tr. pp. 90-91.] In setting aside the attempted defaults on January 13, 1958, the Court remarked [Tr. p. 131]:

"The Court: I think the defaults were prematurely taken, counsel. I do not think there is any excuse for them having been entered, and the motion to set aside the defaults is granted."

At the same hearing, on January 13, 1958, the plaintiffs Gindes' and Linick's motions for protection and for delay in the taking of their depositions as set for a date thereafter, came on for determination. During his argument, counsel for plaintiffs stated as follows [Tr. p. 137]:

"All of the plaintiffs have been subpoenaed for the taking of their depositions on January 14th. Technically the plaintiffs under dispute did not have to respond to the subpoena. However, I am not arguing that."

At the conclusion of the hearing, the Court announced from the bench that the motions to continue the time of taking depositions would be denied. [Tr. p. 38.] This

was formalized by minute order the same date. [Tr. p. 43.]

In its opening brief (Op. Br. p. 8), the defendant Far West has set forth the applicable law, to which the plaintiffs have given no response of authority. It would be difficult to imagine a more patent disregard of Court process or the rights of a party litigant. With an uncontradicted record, if the *Federal Rules of Civil Procedure*, and particularly Rule 37(d) thereof, mean anything, this is not an appropriate area of discretion. Disobedience of judicial process should carry the consequences the law provides, or we should frankly abandon the concept of the authority of judicial process in favor of a rule of convenience.

II.

Failure of the Plaintiffs Gindes and Linick to Observe the Court's Subpoena Re Deposition Is Not Excused by Their Assertion That "There Was Nothing in Fact Discoverable From" Them.

The fact that plaintiffs contend to the contrary is surprising. It is less surprising that plaintiffs are unable to cite a single authority to support their remarkable proposition. It is submitted that there is no such authority, and that such a position is intellectually insupportable.

In view of the uncontradicted facts heretofore set out, one may feel morally confused at plaintiffs' position. However, one cannot fail to feel logically outraged. What right does the adverse party have to adjudicate in advance the course, scope, and value of a particular line of discovery inquiry to a particular litigant? This Court has heretofore spoken to uphold the sanctions supporting the discovery process.

Collins v. Wayland, 139 F. 2d 677.

C. Plaintiffs Were Exempted From the Overtime Provisions of the Applicable Legislation.

I.

By Reason of the Court's Findings.

Pursuant to the trial court's direction, plaintiffs submitted and the Court signed in each of the within cases a *finding* substantially as follows [Tr. p. 47]:

"VIII.

That defendant's failure to compensate Craig for such employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half ($1\frac{1}{2}$) times the regular rates at which he was employed was in good faith."

Section 258 and 259 (29 *United States Code*) provide that liability or punishment will not accrue to the employer who, acting in "good faith" upon the approval or interpretation of the Department of Labor, fails to pay overtime compensation under the Fair Labor Standards Act.

This cause is not past the contention stage. The trial court, based upon evidence in the record [see, *e.g.*, Tr. pp. 164-167], made the *finding* quoted above that the defendant Far West's failure to compensate plaintiffs for employment in excess of 40 hours per week "*was in good faith.*" As previously declared by this Court in a case of similar character, *Lassiter v. Guy F. Atkinson Co.*, 176 F. 2d 984, at page 993:

"Whether the employers here acted in good faith is essentially a question of fact. This fact has been found by the trial court."

It is possible to make the argument that the approval or interpretation must invariably be (1) in writing, and (2)

by the Wage and Hour Division of the Department of Labor. The Courts have not required so inflexible and wooden an approach.

See

Reed v. Murphy, 232 F. 2d 668, 674.

II.

The Evidence Confirms the Exemption Status of Plaintiffs by Reason of a Guaranteed Compensation Arrangement.

The applicable statutory law and regulations are set forth in the defendant Far West's opening presentation. (Op. Br. pp. 14-20.) Plaintiffs sweepingly reject defendant's analysis, but give us little to justify the generalization made.

Aside from the presentation of defendant Far West, referred to above, additional corroboration exists in the record. An examination of Exhibits A through J shows the following, as testified by the defendant Far West's president [Tr. p. 159]:

<u>Plaintiff's Name</u>	<u>Amount for 40 Hrs. 5 Hrs. Overtime (Weekly Guarantee)</u>	<u>Actual Approx. Aver- age Weekly Earnings During Supervisorial Period</u>
Craig	\$178.13	\$221.10
Soldis	190.00	233.60
Gaiennie	125.88	171.50
Morrison	201.88	256.40
Pyle	178.13	203.20
Ingildsen	178.13	212.10
Clement	178.13	242.60
Linick	166.25	178.40
Gindes	190.00	228.30
Massar	130.62	142.70

(Care should be taken to avoid confusion with other weeks shown, where, as appears, both straight-time and over-

time were paid.) Now, for the period of supervisory engineering work, as alleged by the complaint, and limited only to the executive "straight-time" weeks, the Exhibits A through J (excluding, of course, in certain instances, the commencing or terminal weeks), demonstrates that the weekly guarantee was exceeded.

III.

The Law Compels the Conclusion That Plaintiffs Were Exempted Under the Act.

An argument might be made on the basis of the recent decision of *Mitchell v. Lublin, McGuaghy, et al.*, U. S., 36 Labor Cases, Section 65149, where work done by employees of an architectural and consulting firm which did work in and maintained offices in the District of Columbia and nearby states was considered to be of a character to invoke coverage of the Act. In the present case before this Court we are concerned with professional and supervisory *engineering* personnel. It is clear that such personnel were considered exempted under *Mitchell v. Lublin, etc., supra*, for the Court states:

"The parties are agreed that respondent's professional employees—architects and engineers—are exempted from the coverage of the Act by §13(a) (1), 29 U. S. C. §213(a)(1). Therefore, the Secretary's injunction action is directed at some fifty employees mentioned above: draftsmen, fieldmen, clerks and stenographers."

The Court went on to some pains to review the actual interstate character of the work actually performed by the employees mentioned, including actually crossing state lines in gathering data. (Fieldmen included surveyors, transitmen, and chainmen who often crossed state lines.) The long-utilized test of the individual employee's actual

activity is again confirmed. It is interesting to note that even as regards such character of employees, performing such basic activities, the dissenting Justices felt that the factual determination of coverage was not clearly covered by the Act.

In connection with this matter, it is doubtless fair to point out that a cook and caretaker for maintenance-of-way men *on an interstate railway line* has been held not covered by the Act. *McLeod v. Threlkeld*, 319 U. S. 491, *cf.*, *Chicago & E. I. R. Co. v. Industrial Com.*, 284 U. S. 296. The Courts will, in delimiting the coverage of an Act of Congress, give great if not controlling, consideration of the evils intended to be corrected by the subject legislation. *Apex Hosiery v. Leader*, 310 U. S. 469. It would seem clear, in evaluating the intent of Congress in enacting the *Fair Labor Standards Act*, 29 *United States Code*, Section 202 (see discussion, Opening Brief of defendant Far West, pp. 18-20), that plaintiffs Craig, *et al.*, have not carried the burden of proof in establishing here "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being" of the workers here involved.

Conclusion.

It is respectfully submitted that the Judgment of the District Court is erroneous and should be reversed with instructions, on the grounds heretofore set forth.

Respectfully submitted,

JULIUS A. LEETHAM,

*Attorney for Appellant, Far West Engineering
Co., Inc.*

No. 16040

**In the United States Court of Appeals
for the Ninth Circuit**

ALBERT S. CRAIG, ET AL., APPELLANT

v.

FAR WEST ENGINEERING COMPANY, INC., APPELLEE

FAR WEST ENGINEERING COMPANY, INC., APPELLANT

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**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

**BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE**

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FEB 26 1959

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SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

STATEMENT OF THE CASE

The Secretary of Labor, United States Department of Labor, files this brief as *amicus curiae* because of the importance of the coverage and exemption issues presented here to his duties in the administration and enforcement of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. Sec. 201, *et seq.*).¹

¹ The Secretary, by virtue of Reorganization Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. 1332-15, effective May 24, 1950, is responsible for the duties theretofore vested in the Administrator of the Wage and Hour Division by the Act.

This is an action under Section 16(b) of the Act to recover overtime compensation, liquidated damages, and attorney's fees. It was brought against appellant, an engineering firm of Los Angeles, California, by certain of its employees who were engaged in the production of draftings and designs for aircraft, missile and electronic test equipment for interstate commerce (R. 45-47, 49, 51, 223-224). The draftings and designs were prepared for the Tucson, Arizona plant of the Hughes Aircraft Company (R. 162, 176, 223). On the basis of these facts the trial court held that the employees were "engaged in the production of goods for commerce" within the meaning of the Act (R. 53-55, 58). It also held that the employees were not exempt under Section 13(a)(1) of the Act as being "employed in a bona fide executive, administrative [or] professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." It based this holding on its finding that each plaintiff was "an hourly employee" (R. 46, 47, 49-50, 51-52).

ARGUMENT

I. Plaintiffs were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act

The Fair Labor Standards Act applies to all employees "engaged in commerce or in the production of goods for commerce," and defines these terms in Section 3 (29 U.S.C.A. § 203) as follows:

(b) "Commerce" means trade, commerce, transportation, transmission, or communication

among the several States or between any State and any place outside thereof.

* * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character * * *.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

The preparation of draftings and designs for the manufacture of aircraft, missile and electronic test equipment, which is to be transported to points outside the State of its manufacture, clearly constitutes a "closely related process or occupation directly essential to the production" of such "goods" for "commerce" within the meaning of the Act.

In view of the Supreme Court's decision in *Powell v. United States Cartridge Co.*, 339 U.S. 497, there can be no doubt that aircraft, missile and electronic test equipment constitutes "goods" within the meaning of the Act. In *Powell*, the main question was whether the production of munitions was covered by the Act when the munitions were "for transportation outside of the state and for use by the United

States in the prosecution of the war, but not for sale or exchange" (339 U.S. at 511). In sustaining coverage for employees engaged in the production of such munitions, the Supreme Court relied upon the Act's broad definition of "goods." It also quoted the Act's statutory definition of "commerce" with emphasis on the language "*transportation * * * among the several states or from any State to any place outside thereof*" (*ibid.*, emphasis the Court's). This language, said the Court, includes "interstate shipments or transportation as such, and not merely * * * shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point its previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.*, at 512). Pointing out that the "Government's munitions plants provided an appropriate place for the beneficial application of the Act's standards of working conditions without danger of reducing employment through loss of business" (*id.*, at 511), the Court made the following statement which is equally apt here:

This Act would fail materially in its purpose if it did not reach the producers of the tremendous volume of wartime goods destined for interstate transportation. In 1941-1945 the manufacture of munitions was a major source of employment. Wages and hours in that industry were a major factor in fixing the living standards of American labor. (*Id.*, at 511).

Pointing also to the Act's "specificity" in listing exemptions, the Court noted that Congress "could have exempted employees engaged in producing munitions for use by the United States in war, rather than for sale or exchange by it," but "Congress stated no such exemptions," and "[o]n the contrary, Congress included, by express definition of terms, employees engaged in the production of goods for interstate *transportation*" (*id.*, at 512, emphasis the Court's).

Today, the Government's tremendous missile program is similarly "a major source of employment" and "a major factor in fixing the living standards of American labor." And Congress has no more exempted from this Act work in connection with the production of missiles or missile test equipment for interstate transportation than it has exempted production of munitions destined for interstate transportation.

It is thus clear that aircraft, missile and electronic test equipment constitutes "goods" within the meaning of the Act. It is equally clear, we submit, that the preparation of draftings and designs for the manufacture of such "goods" is work "closely related" and "directly essential" thereto. As the Supreme Court pointed out in *Borden Co. v. Borella*, 325 U.S. 679: "Production of goods is not simply the manual, physical labor involved in changing the form or utility of a tangible article. * * * Equally a part of that pattern are the administration, management and control of the various physical proc-

esses together with the accompanying accounting and clerical activities. * * * He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it." 325 U.S. at 682. Accordingly, employees performing the more intangible executive and office work in the Borden building were held to be "engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants" (*ibid.*).

And, in its most recent decision under the Act, *Mitchell v. Lublin, McGaughy & Associates*, 79 S. Ct. 260 (not yet officially reported), the Supreme Court sustained coverage for draftsmen, fieldmen, clerks and stenographers of an architectural and consulting engineering firm engaged in preparing plans and specifications for construction projects involving the improvement of instrumentalities of commerce. The following passage from the opinion of Chief Justice Warren is particularly pertinent:

In our view, such work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned. In our modern technologically oriented society, the elements which combined to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and

bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were immediately related to such preparation were "engaged in commerce." (79 S. Ct. at 264.)

The same conclusion was earlier reached by this Court in *Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, and by the Second and Eighth Circuits in *Laudadio v. White Construction Co.*, 163 F. 2d 383, and *Mitchell v. Brown*, 224 F. 2d 359, certiorari denied, 350 U.S. 875. In the *Ritch* case, this Court ruled that no distinction could rationally be drawn between so-called "white collar" workers ("draftsmen engaged in designing and laying out the work to be done by others") and workers physically engaged in construction operations which were performed "all pursuant to the draftsmen's plans" (156 F. 2d at 337).

The principles of the above cases, although they arose under the Act's "in commerce" phase of coverage, are equally applicable here. As the Supreme Court has pointed out, "the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce" (*Armour & Co. v. Wantock*, 323 U.S. 126, 131; and see *Chambers Construction Company v. Mitchell*, 233 F. 2d 717, 722-723 (C.A. 8)). If, therefore, the preparation of plans and specifications for instrumentalities of commerce is "directly related to the end products," the preparation of plans and

specifications for the manufacture of goods for commerce is, *a fortiori*, “closely related” and “directly essential” to the production of such goods.

This conclusion finds support in the Conference Report on the 1949 Amendments which introduced these terms into the Act. In reporting the change from “necessary” to “closely related and directly essential,” the Managers on the Part of the House expressly stated that “[T]he bill as agreed to in conference also does not affect the coverage under the act of employees * * * who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce” (H. Rept. No. 1453, 81st Con., 1st Sess., p. 14).²

Draftings and designs, no less than tools and dies, are indispensable to the production of articles of advanced design in “our modern technologically oriented society” (*Lublin*, 79 S. Ct. at 264). They are an “integral part of the coordinated productive pattern of modern industrial organizations” (*Borden*, 325 U.S. at 683), “directly related to the end products” (*Lublin*, *supra*). The court below was thus clearly correct in holding that Far West’s employees, who prepared draftings and designs for aircraft, missile and electronic test equipment, were engaged in the production of goods for commerce within the meaning of the Act.

An additional and independent ground of coverage exists by reason of the fact that the draftings and designs were sent outside the State. It is not disputed that during the period in controversy, 95 percent of

² The Senate Conferees’ Statement cites *Borden Co. v. Borella*, 325 U.S. 679, with approval. See 95 Cong. Rec. 14874.

Far West's work came from the Tucson plant of Hughes Aircraft Company (R. 223). Nor is it disputed that Hughes Aircraft conceived the ideas (R. 249) and furnished, with its purchase orders to Far West, the basic design (R. 255)—a "layout drawing" or a "sketch" (R. 191-192)—for the work.

It is plain that in these circumstances the draftings and designs—in reality, scale pictures (R. 192)—are "goods"; the statutory definition in Section 3(i) of the Act goes beyond "wares, products, commodities [or] merchandise," and includes "articles or subjects of commerce of any character." And to draw, prepare and handle scale pictures is to "produce" them within the meaning of Section 3(j), which defines the term to include not only "produced, manufactured, or mined," but also "handled, or in any other manner worked on."

The breadth of these definitions is not only self-evident, but has been authoritatively confirmed by the Supreme Court in *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490. There the Court had no difficulty in concluding that telegraph messages are "articles or subjects of commerce" and hence "goods" under the Act (323 U.S. at 502), and that the terms "handled" and "worked on" in the statutory definition of "produced" include "every kind of incidental operation preparatory to putting goods into the stream of commerce." 323 U.S. at 503.

The rationale of the *Western Union* case has been applied by the courts to documents and policies prepared, issued and handled by banks and insurance companies (*Union National Bank of Little Rock v. Durkin*, 207 F. 2d 848 (C.A. 8); *Bozant v. Bank of*

New York, 156 F. 2d 787 (C.A. 2); *Darr v. Mutual Life Insurance Co.*, 169 F. 2d 262 (C.A. 2); certiorari denied, 335 U.S. 871), and to advertising materials and book manuscripts edited and prepared for printing (*Baldwin v. Emigrant Industrial Savings Bank*, 150 F. 2d 524 (C.A. 2), certiorari denied, 326 U.S. 767). In every essential respect, the draftings and designs here are as much "goods" as the papers and documents in the foregoing cases, since in each case the preparation of the documents was a principal purpose of the employer's activity and the vital part of its business, the shipment was indisputably interstate, and the product had considerable physical substance and was useful in itself.

On page 5 of its "Opening Brief," Far West cites *McComb v. Turpin*, 81 F. Supp. 86 (D. Md.), where it was held that plans and specifications are not "goods" within the meaning of the Act because they "are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto" (81 F. Supp. at 89).³ The *Turpin* decision, however, antedates the Supreme Court's holding in the *Powell* case, *supra*, that there is "no merit in an interpretation of the Act which

³ Far West cites a number of other cases which have little or no authoritative value. Thus, *Mitchell v. Kroger Co.*, 150 F. Supp. 30, cited on page 6 of its "Opening Brief," has been reversed by the Eighth Circuit. See 248 F. 2d 935. *Koepfle v. Garavaglia*, 200 F. 2d 191, and *Nieves v. Standard Dredging Corp.*, 152 F. 2d 719, cited on page 5 of the "Opening Brief," were, in effect, overruled in *Mitchell v. Vollmer & Co.*, 349 U.S. 427. And the result reached by the Third Circuit in *Mitchell v. Household Finance Corp.*, 208 F. 2d 667, has been questioned by the First Circuit in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190.

would exclude from its coverage those employees who were engaged in the production of [goods] for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U.S. at 512). In addition, *Turpin* is factually distinguishable from the instant case. There, as noted above, the court found that the plans and specifications were incidental to the employer's principal business of giving professional advice to its clients. Here, in contrast, the customer itself conceived the ideas and furnished the basic designs for the work (R. 255), so that the finished draftings and designs are the principal product of Far West's business.

Far West also cites *Collins v. Ford, Bacon and Davis*, 71 F. Supp. 229 (E.D. Pa.), but to the extent that that case has any application to Far West's business, it indicates plainly that the plans and specifications are "goods," for the court said:

Plans, designs and letters by which information is transmitted can be considered "goods" only when the plans themselves or the information contained in the letters is the thing which the employer sells and his customers buy [71 F. Supp. at 230].

That is precisely the situation here, at least in the case of the Hughes Aircraft jobs. The thing which that customer bought was finished draftings or designs. Hughes had the necessary manpower to make the lay-out drawings or basic designs (R. 254); it had to farm out, so to speak, the scale-picture work.

Since, as we have shown, the draftings and designs

in this case constitute "goods" within the meaning of the Act, and since they were sent outside the State, the plaintiffs were engaged in actual, or primary, production for commerce, as well as in work "closely related" and "directly essential" to the production of goods for commerce, namely, aircraft, missile and electronic test equipment.

II. Employees compensated at an hourly rate are not "employed in a bona fide executive, administrative, professional * * * capacity" within the meaning of Section 13(a)(1) of the Act

The exemption set forth in Section 13(a)(1) of the Act applies to "any employee employed in a bona fide executive, administrative, professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." The administrative Regulations defining and delimiting these terms⁴ include a "salary test" which must be met in order for an employee to fall within one of these classifications. One of the elements in the definition of an "executive" is that he "is compensated for his services on a salary basis at a rate of not less than \$80 per week;"⁵ and one of the elements in the definition of a "professional" is that he "is compensated for his services on a salary or fee basis at a rate of not less than \$95 per week"⁶ (29 C.F.R. §§ 541.1(f), 541.3(e)).

⁴ The Regulations defining and delimiting the terms "executive" and "professional" are set forth at length at pages 14-17 of the Opening Brief of Appellant Far West.

⁵ As amended, 23 F. R. 8962, effective February 2, 1959; previously "\$55 per week."

⁶ As amended, 23 F.R. 8962, effective February 2, 1959; previously "\$75 per week."

These Regulations, it is well established, "have the force of law as much as though they were written in the statute" (*Helliwell v. Haberman*, 140 F. 2d 833, 834 (C.A. 2); *Fanelli v. United States Gypsum Co.*, 141 F. 2d 216 (C.A. 2)), and an employer claiming the benefit of one of these exemptions has the burden of proving the existence of each of the conditions set forth in the Regulations, including the salary requirement. *Helliwell v. Haberman*, *supra*; *Fanelli v. United States Gypsum Co.*, *supra*; *Walling v. General Industries Co.*, 330 U.S. 545, 547-548; *Smith v. Porter*, 143 F. 2d 292 (C.A. 8); *Walling v. Yeakley*, 140 F. 2d 830 (C.A. 10); *Walling v. Morris*, 155 F. 2d 832 (C.A. 6), modified on other grounds, 332 U.S. 422; *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616 (C.A. 8); *Chepard v. May*, 71 F. Supp. 389 (D.C., S.D. N.Y. 1947); Annotation, 40 A.L.R. 2d 332. As the Eighth Circuit noted in *Smith v. Porter*, *supra*, the "precise question here is not whether the [plaintiffs] were employed in an executive capacity within the meaning the phrase may have in common usage, but whether [they] were so employed within the definition as promulgated by the administrator under authority of law" (143 F. 2d at 295).⁷

The salary test is, indeed, particularly appropriate. The reason underlying the allowance of the

⁷ These decisions, all antedating the Fair Labor Standards Amendments of 1949 (which made no change in the exemption for executive, administrative and professional employees), derive additional force from Section 16(c) of those Amendments, in which Congress expressly ratified all outstanding Regulations of the Secretary in the following language:

exemption is, as pointed out by the Eighth Circuit in the *Helena Glendale* case, that “[E]xecutive, administrative and professional workers are not usually employed at hourly wages nor is it feasible in the case of such employees to provide a fixed hourly rate of pay nor maximum hours of labor” (132 F. 2d at p. 619). Further, the Report of the Presiding Officer issued to accompany the 1940 Regulations in which the test was initiated (5 F.R. 4077), characterized the salary criterion as the best indication of “the employer’s good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable” as belonging to one of these classifications (“Executive, Administrative, Professional * * * Outside Salesman” Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition, CCH Labor Law Service, 3rd Ed., Pars. 31,302 *et seq.*, at Par. 31,302.35). The *Yeakley, Morris*

Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act. —

and *Chepard* decisions specifically sustained the validity of the salary test, denying exemptions claimed with respect to employees meeting the other requirements set forth in the Regulations.

Far West's argument that these plaintiffs were exempt from the overtime provisions of the Act as "executive" or "professional" employees cannot survive the trial court's finding that each plaintiff was "an hourly employee" (R. 46, 47, 49-50, 51-52). Plainly, an "hourly employee" is not "compensated on a salary or fee basis." Far West asserts (Opening Brief, pp. 17-19) that these plaintiffs received a guarantee of minimum weekly earnings based on a 45-hour week. However, the trial court's express findings that these plaintiffs were hourly employees, and its failure to find the existence of any such guarantee, indicate that it rejected this contention, which admittedly rests upon conflicting testimony.

Having failed to show compliance with the salary requirements of the Regulations, Far West has not sustained its burden of showing that these plaintiffs are exempt from the Act as executive or professional employees.

CONCLUSION

The decision of the court below, holding these employees to come within the coverage of the Fair Labor Standards Act and that they are not exempted from

¹ See *Steiner v. Mitchell*, 350 U.S. 247, 255; *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 270; *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16-17.

its provisions as executive or professional employees, should be affirmed.

Respectfully submitted.

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FEBRUARY 1959.

No. 16042 ✓

United States
Court of Appeals
for the Ninth Circuit

IRVING I. BASS, Trustee in Bankruptcy of the
Estate of Zipco, Inc., a corporation, bankrupt,
Appellant,

vs.

AETNA FACTORS CO., FRUEHAUF TRAILER
CO., and COM-AIR PRODUCTS, INC.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK

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In The United States District Court for Southern
District of California, Central Division

No. 71250-WM

In the Matter of
ZIPCO, INC., a California Corporation,
Debtor.

IN PROCEEDINGS FOR
AN ARRANGEMENT

To the Honorable Judge of the District Court of
the United States, for the Southern District
of California, Central Division:

The petition of Zipco, Inc., a California Corporation, of the City of Los Angeles, County of Los Angeles, State of California, engaged in the business of operating a drill jig bushing manufacturing business, respectfully represents:

I.

Your petitioner has had its principal place of business at Los Angeles within the above judicial district for a longer period of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

III.

The debtor is a person who could become a bankrupt under Section 4 of the Bankruptcy Act, 11 U.S.C.A. Section 22, and is not a municipality, railroad, insurance or banking corporation, or a building and loan association.

IV.

That your petitioner is unable to pay its debts as they mature and proposes an arrangement for the payment of its unsecured creditors under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C. Section 722, which is contained in Exhibit A annexed hereto and made a part hereof.

V.

That your petitioner will file Schedule A within ten days from the date hereof as per Court Order.

VI.

That your petitioner will file Schedule B within ten days from the date hereof as per Court Order.

VII.

That the statement attached hereto, marked Exhibit "1", and verified by your petitioner's oath, contains a full and true statement of its executory contracts, as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance

with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

Dated: April 4th, 1956.

ZIPCO, INC., a California
Corporation,

By /s/ MILO M. TURNER,
President.

/s/ ROBERT H. SHUTAN,
Attorneys for Petitioner.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on April 5, 1956, before the said Court the petition of Zipco, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Joseph J. Rifkind, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Zipco, Inc., shall attend before said referee on April 12, 1956, and at such times as said

referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable William C. Mathes, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 5, 1956.

JOHN A. CHILDRESS,
Clerk,

By /s/ REX LAWSON,
Deputy Clerk.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, California, in said District, on the 11th day of May, 1956.

The petition of the debtor for an arrangement under Chapter XI of the Bankruptcy Act filed on the 5th day of April, 1956, having been withdrawn and said debtor having consented to being adjudged a bankrupt under the Act of Congress relating to bankruptcy, and there being no opposing interest;

It is adjudged that the said Zipco, Incorporated, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 15, 1956.

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT
OF TRUSTEE

At Los Angeles, in said district, on the 31st day of May, 1956, Irving I. Bass, of Los Angeles, California, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It Is Ordered that the appointment of said Irving I. Bass, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at \$5,000.00 dollars.

JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

PETITION FOR ORDER TO
SHOW CAUSE

To the Honorable Joseph J. Rifkind, Referee In
Bankruptcy:

The verified petition of Irving I. Bass respectfully represents:

I.

That he is the duly elected, qualified and acting Trustee in the above-entitled bankruptcy proceeding.

II.

That among the assets of the within estate are various accounts receivable, including an account receivable against Fruehauf Trailer Co., a corporation, accounts receivable against Com-Aire, a corporation, and numerous others.

III.

That the books and records of your petitioner reflect that on May 3, 1956 your petitioner received the payment from Fruehauf Trailer Company made payable to your petitioner as Trustee, in the amount of \$1,067.54, and that on May 9, 1956 your [3]* petitioner received a further payment from Fruehauf Trailer Co., made payable to Zipco, Inc., in the amount of \$1,336.44.

IV.

That your petitioner is informed and believes and upon such information and belief alleges that on May 9, 1956 and subsequent to notice of the within bankruptcy proceedings, Fruehauf Trailer Co. paid over to the Los Angeles County Marshal's office the sum of \$863.58 pursuant to an execution levied against the account of the bankrupt.

V.

That the books and records of the bankrupt reflect that the total amount which was due and owing the bankrupt from Fruehauf Trailer Co. was the sum of \$4,086.60 of which your petitioner

* Page numbers appearing at bottom of page of Original Transcript of Record.

has received the above mentioned payments totaling \$2,403.98, leaving a balance of \$1,682.62 owing this estate, including the aforementioned sum paid under execution.

VI.

That your petitioner is informed and believes and upon such information and belief alleges that Aetna Factors Company, a copartnership, claims that the accounts receivable of Fruehauf Trailer Co. and of Com-Aire and other accounts receivable of the bankrupt were duly and properly assigned to Aetna Factors Company prior to bankruptcy and that all sums due under the said accounts receivable and all sums heretofore collected by your petitioner on account of the said accounts receivable are property of the said Aetna Factors Company.

VII.

That your petitioner is informed and believes and upon such information and belief alleges that if there was any assignment of accounts receivable of the bankrupt to Aetna Factors Company that the same was without full or adequate consideration. [4]

VIII.

That your petitioner is informed and believes and upon such information and belief alleges that if there was any assignment of accounts receivable from the bankrupt to Aetna Factors Company that in the process of such assignment Section 3019 of the California Code of Civil Procedure was not complied with and that the said assignment should therefore be void as to your Trustee.

IX.

That your petitioner is informed and believes and upon such information and belief alleges that Aetna Factors Company has made demand for payment upon various of the accounts receivable of the bankrupt, and that Com-Aire and others have refused to pay your petitioner and have refused to pay Aetna Factors Company pending a determination by the Court as to who is the holder of title in and to the said accounts receivable.

Wherefore, your petitioner prays that the Court make and enter its Order to Show Cause, returnable on a day and at a time certain requiring Fruehauf Trailer Co. to appear and show cause, if any it may have, why the Court should not make and enter its Order that any assignment of accounts receivable to Aetna Factors Company is void as against your Trustee, and to further show cause why the Court should not make and enter its Order declaring and decreeing that Fruehauf Trailer Co. is indebted to this estate in the amount of \$1,682.62, and to further show cause why the Court should not make and enter its Order declaring and decreeing that the above set forth payment under execution was void as to the Trustee in Bankruptcy.

Your petitioner further prays that the Court make and enter its Order to Show Cause, addressed to Aetna Factors Company, requiring that it appear on a day and at a time certain to show cause, if any it may have, why the Court should not [5]

make and enter its Order that it has no lien, claim or charge in or to accounts receivable of the bankrupt; and your petitioner further prays that the Court make and enter its Order to Show Cause addressed to Com-Aire Corporation requiring it to appear on a day and at a time certain and show cause, if any it may have, why the Court should not enter its Order that all sums payable by it by virtue of accounts receivable of the bankrupt are payable to the Trustee, and that the same are not payable to Aetna Factors Company.

Dated: February 1, 1957.

/s/ IRVING I. BASS,

Trustee.

CRAIG, WELLER & LAUGHARN,

/s/ By WILLIAM E. BARTLEY,

Attorneys for Trustee. [6]

Duly Verified. [7]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST
FRUEHAUF TRAILER CO.

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Fruehauf Trailer Co. and Aetna Factors Company appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Street, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not make and enter its Order that any assignment of accounts receivable to Aetna Factors Company is void as against the Trustee, and to further show cause why the Court should not make and enter its Order declaring and decreeing that Fruehauf Trailer Co. is indebted to this estate in the amount of \$1,682.62, and for such other relief as may be proper in the premises. [8]

It Is Further Ordered that if the respondents desire to answer, plead or otherwise respond to said Petition, the same shall be in writing and served and filed at least two (2) days prior to the hearing hereof; and

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Fruehauf Trailer Co. and Aetna Factors Company, at least five (5) days prior to the within hearing.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [9]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST
COM-AIRE CORPORATION

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Com-Aire Corporation, Aetna Factors Company, appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Streets, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not enter its Order that all sums payable by it by virtue of accounts receivable of the bankrupt are payable to the Trustee, and that the same are not payable to Aetna Factors Company.

It Is Further Ordered that if the respondents desire to answer, plead or otherwise respond to said Petition, the same shall be in writing and served and filed at least two (2) days prior to [10] the hearing hereof; and

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Com-Aire Corporation

and Aetna Factors Company at least five (5) days prior to the hearing hereof.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [11]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST
AETNA FACTORS CO.

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Aetna Factors Company appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Street, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not make and enter its Order that said Aetna Factors Company has no lien, claim or charge in or to accounts receivable of the bankrupt; and

It Is Further Ordered that if the respondent desires to answer, plead or otherwise respond to said Petition, the same shall be in writing and served

and filed at least two (2) days prior to the hearing hereof; and [12]

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Aetna Factors Co., at least five (5) days prior to the hearing hereof.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [13]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE ORDER TO
SHOW CAUSE V. AETNA FACTORS,
FRUEHAUF TRAILER COMPANY AND
COM-AIR PRODUCTS, INCORPORATED

The trustee in bankruptcy by appropriate petition and order to show cause seeks to determine the validity of the assignments from the bankrupt to the Aetna Factors of certain accounts receivable due from Fruehauf Trailer Company and Com-Air Products, Incorporated, respectively. Notice of assignment in general terms not referring to the specific accounts involved, was executed and recorded within the time and manner required by Section 3017 et seq. of the Civil Code. Counsel for all parties have thoroughly prepared and ably presented their case.

The purchase order from Fruehauf Trailer Com-

pany to Zipco, Incorporated, provides in paragraph 5 "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall [21] any part of the work be sub-contracted by the vendor without prior written consent of the purchaser." The purchase order from Com-Air Products, Incorporated, to Zipco, Incorporated, provides in paragraph 15 "Assignment and Subcontracting. This order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without the prior written consent of the buyer in each instance."

Fruehauf Trailer Company and Com-Air Products, Incorporated, have refused to recognize the assignment. Aetna Factors has filed suit against Fruehauf Trailer Company and Com-Air Products, Incorporated, to recover the accounts assigned. This court has enjoined Aetna Factors from continuing the further prosecution of such actions pending its determination of the validity of the assignments. Should this court determine the provision against assignment is valid, the money will be paid to the trustee in bankrupt. On the other hand, should this court determine the provision against assignment is invalid, the money will have to be paid to Aetna Factors or it may proceed with the pending action to compel payment pursuant to the assignment.

The respondents, Fruehauf Trailer Company, Com-Air Products Company and Aetna Factors, all made motions to [22] dismiss on the ground the

bankruptcy court did not have jurisdiction. It is obvious that neither Fruehauf Trailer Company nor Com-Air Products Company are disputing the right of the trustee in bankruptcy to the money and they are, therefore, not bona fide adverse claimants. The Motion to Dismiss of Fruehauf Trailer Company and Com-Air Products, Incorporated, on the ground that this court does not have jurisdiction, even if it had been timely and properly presented, is not well grounded. Since Aetna Factors does not have possession of the funds involved in the controversy, it also is obviously not a bona fide adverse claimant and its Motion to Dismiss on the ground that this court does not have jurisdiction, even if it had been timely and properly presented, is equally groundless. None of the respondents are bona fide adverse claimants and this court has constructive possession of and control over the money involved in the controversy. The Motions to Dismiss, as indicated at the hearing, are and each of them is denied, on the ground (1) that respondents are not bona fide adverse claimants and (2) the Objection to Jurisdiction and Motions to Dismiss were not timely made. Section 2 a (7) provides:

“* * * and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before [23] the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the

petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;”

Bankruptcy courts have jurisdiction over property within their actual or constructive possession. See *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478; *Goggin v. Bolsa Chica* (9 Cir.) 125 F (2) 104; *City of Long Beach v. Metcalf* (9 Cir.) 103 F (2) 483. A person in possession of funds payable to bankrupt, who makes no adverse claim thereto, is subject to summary jurisdiction, even though others may be asserting claim to such funds adverse to the bankrupt estate. See *in re Goldman* (S.D. of N.Y.) 5 F. Supp. 973; *Lahey v. Trachman* (2 Cir.) 130 F (2) 748; *In re Patrick* (7 Cir.) 194 F (2) 750.

The validity of the provision in the purchase orders against assignment must be determined according to state law. *Erie v. Tompkins*, 304 U.S. 64; *Laugharn v. Bank of America* (9 Cir.) 88 F (2) 551, page 553; *Stoner v. New York Life Insurance Company*, 311 U.S. 464; *Fidelity v. Field*, 311 U.S. 169; *West v. American Telephone and Telegraph Company*, 311 U.S. 223. [24]

The rights and remedies of the trustee in bankruptcy in relation to such contract and the funds accruing and payable thereunder are fixed and determined by the Bankruptcy Act. The trustee in bankruptcy, in addition to the rights of the bankrupt, is under Section 70c of the Bankruptcy Act, vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then

holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists. *Constance v. Harvey* (Cir. 2) 215 F (2) 571 p 575 certiorari denied 348 U.S. 913; *U.S. v. Eiland* (Cir. 4) 223 F. (2) 118; *Sampsell v. Straub* (Cir. 9) 194 F (2) 228 p. 231; *England v. Sanderson* (Cir. 9) 236 F. (2) 641 p 643.

It will therefore be seen that although the validity of the contract must be determined by state law, that the rights of the trustee in bankruptcy are fixed and determined by the Bankruptcy Law. An agreement may therefore be valid between the parties but invalid as to creditors of the bankrupt. The bankrupt's estate is insolvent and claims are scheduled in the sum of \$171,101.03 (including wages of \$9,436.68 and taxes due United States, etc. of \$16,029.26). In *Arnold v. Phillips* (5 Cir.) 117 F (2) 497, the court at pages 500-501 states as follows:

"The parties differ radically as to what system of [25] law controls. We are of opinion that in a bankruptcy case the ownership of property depends ordinarily on the State law, and so does the existence of a debt and the validity of the security for it. The enquiry begins in State law, but does not end there. Whether when bankruptcy supervenes a title acquired by one creditor is good against other creditors, and what are the relative rights and standing of creditors as against each other, and what the propriety of recognizing and enforcing secured debts under varying circumstances, are questions so related to the bankruptcy

power as to be regulable by Congress; they are of the essence of bankruptcy law. There necessarily arises also a body of judicial interpretation having the effect of law, which overrides the interpretation of the State courts on similar questions. The 'equity' administered in the bankruptcy courts may not be exactly that of the State courts."

The court has carefully read the numerous authorities cited by counsel for Aetna Factors. It appears that the case of *Parkinson v. Caldwell*, 126 Cal. App. (2) 548 is the only case helpful in deciding the question confronting us. The language in the Fruehauf Trailer Company contract is not as [26] clear and specific as the language in the Com-Air Products, Incorporated, contract. The language "or any interest thereunder" in the Fruehauf purchase order necessarily includes any money due or to become due and payable to the bankrupt under the contract or such language would be meaningless and surplusage.

The court in *Parkinson v. Caldwell*, *supra*, at p 552-553, states as follows:

"Where the language is clear an agreement not to assign a debt is effective. * * * The purpose of that limitation was clear, that he should not transfer the note before maturity to anyone, either by way of pledge or otherwise. * * * We are not impressed by the argument that this limitation on the power to assign or transfer the note is invalid. A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the

very time of its creation no good reason occurs to us why they may not do so. * * * Finally, appellants argue that to permit the Uncle's estate to recover the proceeds of the note will result in its unjust enrichment, since the Uncle received the money, the repayment of which was attempted [27] to be secured by the pledge of this note. * * * It was established in the trial court that the estate of the Uncle is insolvent and that the Nephew has a claim against the Uncle's estate of approximately \$10,000 for taxes which the Uncle failed to pay on the trust estate during his lifetime."

Since Fruehauf Trailer Company and Com-Air Products, Incorporated, refused to recognize the purported assignment from the bankrupt to Aetna Factors and had not at the date of bankruptcy paid the money accruing under the contract to Aetna Factors, could a creditor of the bankrupt have acquired an attachment or execution lien upon the money in the hands of Fruehauf Trailer Company and Com-Air Products, Inc. If an actual or hypothetical creditor under Section 70 c of the Bankruptcy Act could have acquired a lien upon the funds in possession of Fruehauf or Com-Air on the date of bankruptcy, then obviously the trustee in bankruptcy is entitled to the money. It is the conclusion of the court that a creditor of the bankrupt could have levied an attachment or execution upon the money in the hands of the vendors Fruehauf and Com-Air and, therefore, the funds in their possession are assets of the bankrupt estate.

The law is well established that any assets recovered by the trustee in bankruptcy based upon the rights of any prior [28] existing creditor or based upon the rights of any hypothetical credit existing on the date of bankruptcy are for the benefit of all creditors whose claims are filed and allowed in the bankruptcy proceedings and dividends must be declared and paid equally and ratably to all such unsecured creditors. Section 65a of the Bankruptcy Act, *Moore v. Bay* 285 U.S. 4; *Sampsell v. Imperial Paper Co.* 313 U.S. 215 p. 219; *England v. Sanderson* (9 Cir.) 236 F (2) 641 p 644.

The court concludes that the provision against assignment is valid and that the trustee in bankruptcy can assert the invalidity of such purported assignment. Zipco, Incorporated, will be given thirty (30) days from the date of the order within which to file a general claim for the amount of its claim (Sec. 57n of the Bankruptcy Act.) Counsel for the trustee will prepare findings of fact, conclusions of law and an appropriate order as provided by Rule 7.

Dated: May 10, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Messrs. Craig, Weller and Laugharn, Attorneys for Trustee. Messrs. Ronald B. Labowe and J. L. Ventress, Attorneys for Aetna Factors. Stanley A. Phipps, Esq., Attorney for

Fruehauf Trailer Company. Alex D. Fred,
Esq., Attorney for Com-Air Products, Inc. [29]

[Endorsed]: Filed May 10, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION TO RECONSIDER

To the Trustee in Bankruptcy of the Above Entitled Estate and His Attorneys, Craig, Weller and Laugharn:

Notice Is Hereby Given that on the 31st day of July, 1957, at the hour of 10:00 o'clock A.M., in the courtroom of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, room 330, Federal Building, Temple and Spring Streets, Los Angeles, California, Aetna Factors Company will move the Court to reconsider its decision announced in the Court's Memorandum Opinion of May 10, 1957. Said motion will be made on the ground that under the applicable law of the State of California no hypothetical creditor of the bankrupt could have acquired a lien upon the accounts receivable in controversy and that, accordingly, the Trustee in Bankruptcy cannot prevail under Section 70c of the Bankruptcy Act.

The "Memorandum of Points and Authorities in Support of Aetna Factors Co. on Order to Show Cause" heretofore filed in the above proceedings contains the authorities upon which reliance will be placed. The motion will also be based upon

the entire [30] record of the proceedings had herein.

Dated: June 19, 1957.

AETNA FACTORS COMPANY,
BY LABOWE AND VENTRESS
AND QUITTNER,
STUTMAN & TREISTER,
/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors
Company. [31]

[Endorsed]: Filed June 20, 1957.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF OPINION—ORDER TO SHOW CAUSE v. AETNA FACTORS, ET AL, RE ASSIGNMENT OF ACCOUNTS RECEIVABLE

This matter involves the validity of a provision in a contract against assignment. The court previously ruled that the provision against assignment was valid. Because of the importance of the question involved, the application of newly associated counsel and of the several amicus curiae for permission to re-argue the matter was granted.

The respondents Fruehauf Trailer Company and Com-Air Products, Inc., herein also referred to as the obligors, are engaged in certain defense work. The subcontracts executed by respondents Fruehauf and Com-Air in favor of the bankrupt, contained provisions against assignment without their

consent. There are, of course, numerous reasons why the parties, especially under defense construction contracts, would want a provision against assignment, i.e., to prevent assignment to an irresponsible or incompetent person, to better control and supervise production and rejects, to control credits and offsets, to avoid multiplicity of payments and accounting incidental thereto, to avoid dealing with sundry persons instead [46] of a single person, etc.

The bankrupt assigned certain accounts receivable against the obligors to Aetna Factors, herein also referred to as the factor, without obtaining the consent of the obligors, as required by the contract. Subsequent to the purported assignment the bankrupt continued to send invoices to the obligors and received from the obligors checks in payment thereof until bankruptcy. These checks upon receipt were endorsed by the bankrupt and delivered to the factor. There were substantial balances unpaid under these contracts at the date of bankruptcy. Fruehauf and Com-Air refused to recognize the purported assignment or to pay the unpaid balances to the factor. The factor thereupon filed suit against the obligors in the state court and the factor has been enjoined from further prosecuting such actions pending the outcome of this proceeding.

Counsel for the factor earnestly argues that a provision against assignment in a contract is only for the benefit of the obligor and does not prevent an assignment by the obligee to a third person.

the entire [30] record of the proceedings had herein.

Dated: June 19, 1957.

AETNA FACTORS COMPANY,
BY LABOWE AND VENTRESS
AND QUITTNER,
STUTMAN & TREISTER,
/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors
Company. [31]

[Endorsed]: Filed June 20, 1957.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF OPIN-
ION—ORDER TO SHOW CAUSE *v.* AETNA
FACTORS, ET AL, RE ASSIGNMENT OF
ACCOUNTS RECEIVABLE

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consent. There are, of course, numerous reasons why the parties, especially under defense construction contracts, would want a provision against assignment, i.e., to prevent assignment to an irresponsible or incompetent person, to better control and supervise production and rejects, to control credits and offsets, to avoid multiplicity of payments and accounting incidental thereto, to avoid dealing with sundry persons instead [46] of a single person, etc.

The bankrupt assigned certain accounts receivable against the obligors to Aetna Factors, herein also referred to as the factor, without obtaining the consent of the obligors, as required by the contract. Subsequent to the purported assignment the bankrupt continued to send invoices to the obligors and received from the obligors checks in payment thereof until bankruptcy. These checks upon receipt were endorsed by the bankrupt and delivered to the factor. There were substantial balances unpaid under these contracts at the date of bankruptcy. Fruehauf and Com-Air refused to recognize the purported assignment or to pay the unpaid balances to the factor. The factor thereupon filed suit against the obligors in the state court and the factor has been enjoined from further prosecuting such actions pending the outcome of this proceeding.

Counsel for the factor earnestly argues that a provision against assignment in a contract is only for the benefit of the obligor and does not prevent an assignment by the obligee to a third person.

Counsel for the factor further argue that the assignment would have been valid against a judgment creditor of the bankrupt, and that such assignment is therefore valid against the trustee in bankruptcy, who stands in the same position under Section 70c of the Bankruptcy Act.

Counsel for the trustee and supporting amicus curiae argue with equal earnestness that the assignment is void because it is in violation of the provision in the contract against assignment. [47] They further argue that a judgment creditor could therefor have levied an execution upon the undisbursed funds in the possession of the obligor. They further argue that such assignment is therefor void as to the trustee in bankruptcy. This controversy is, of course, the very crux of the problem confronting us.

Section 70c of the Bankruptcy Act provides as follows:

“The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor

when holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The validity of the clause in the contracts against assignment must, of course, be determined according to state law. *Erie v. Tompkins*, 304 U.S. 64; *Laugharn v. Bank of America* (9 Cir.) 88 F (2) 51 page 553; *In re Bastanchury* (9 Cir.) 66 F (2) 53 page 656.

Respondents *Aetna Factors* and *amicus curiae* supporting its position, strongly rely on the case of *Johnston v. Landucci* (1942) [48] 21 Cal. (2) 3. The court on page 67 states the rule relating to assignment of contracts, as follows:

"Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment, such as that contained in paragraph 17 of the *Miller & Lux* contract, are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the *Restatement of the Law of Contracts*. Section 176 reads as follows: 'A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from dis-

Counsel for the factor further argue that the assignment would have been valid against a judgment creditor of the bankrupt, and that such assignment is therefore valid against the trustee in bankruptcy, who stands in the same position under Section 70c of the Bankruptcy Act.

Counsel for the trustee and supporting amicus curiae argue with equal earnestness that the assignment is void because it is in violation of the provision in the contract against assignment. [47] They further argue that a judgment creditor could therefore have levied an execution upon the undisbursed funds in the possession of the obligor. They further argue that such assignment is therefore void as to the trustee in bankruptcy. This controversy is, of course, the very crux of the problem confronting us.

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then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.”

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“Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment, such as that contained in paragraph 17 of the *Miller & Lux* contract, are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the *Restatement of the Law of Contracts*. Section 176 reads as follows: ‘A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from dis-

charging his duty under the contract in any way permissible if there were no such prohibition.'

"The rule that such provisions are for the benefit of the seller and in no way affect the validity of an assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court (*Portuguese-American Bank v. Welles*, 242 U.S. 7 (37 S. Ct. 3, 61 L.Ed. 116)), and is the rule approved by Williston in his work on Contracts (*Williston on Contracts*, Revised ed., vol. II, section 422). Although there are no cases [49] in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee. (*Potts Drug Co. v. Benedict*, 156 Cal. 322 (104 P. 432, 25 L.R.A.N.S. 609); *Garcia v. Gunn*, 119 Cal. 315 (51 P. 684); *Randol v. Tatum*, 98 Cal. 390 (33 P. 433); *Kendis v. Cohn*, 90 Cal. App. 41 (265 P. 844).)"

Were there no other or later decisions of the appellate courts of our state relating to the subject, the problem of this court would be quite simple.

We find, however, the much later decision of *Parkinson v. Caldwell* (1954) 126 Cal. App. (2) 548. This decision was not only decided twelve years later but specifically relates to assignment of choses in action whereas the reference to choses in action in the earlier case of *Johnston v. Landucci*, *supra*,

was dictum since the court in that case was dealing with the assignment of the vendee's interest under a land purchase contract.

Counsel for the trustee in bankruptcy and the amicus curiae supporting that position, on the other hand strongly rely on the case of *Parkinson v. Caldwell*, *supra*. The court in *Parkinson v. Caldwell*, *supra*, on pages 552-53, sets forth the rule of law as follows:

"Where the language is clear an agreement not to [50] assign a debt is effective. The precise question was elaborately discussed by the New York Court of Appeals in *Allhusen v. Caristo Const. Co.*, 303 N.Y. 446 (103 N.E. 2d 891), and at page 893 (103 N.E. 2d) the court concluded:

'In the light of the foregoing, we think it is reasonably clear that, while the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited.'

"So in 4 *Corbin on Contracts*, section 872, page 486 the author says:

'In any case, it is quite possible for the parties to show by apt words that rights created by the contract shall not be assignable. It is obvious that they mean exactly this and nothing else in case the contract is unilateral from the beginning. * * * So if A lends money to B, receiving from B a note

that expressly declares that it is not assignable, there is no doubt that they mean A's right to the money to be non-assignable.' * * *

"We are not impressed by the argument that this limitation on the power to assign or transfer the note is invalid. A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the very time of its [51] creation no good reason occurs to us why they may not do so. The New York Court of Appeals in *Allhusen v. Caristo Const. Co.*, supra, 103 N.E. 2d at page 893, said of a similar argument of invalidity: 'Such a holding is not violative of public policy. Professor Williston, in his treatise on Contracts, states (vol. 2, Section 422, p. 1214): "The question of the free alienation of property does not seem to be involved."' The New York cases do not hold otherwise. * * * Plaintiff's claimed rights arise out of the very contract embodying the provision now sought to be invalidated. The right to moneys under the contracts is but a companion to other jural relations forming an aggregation of actual and potential interrelated rights and obligations. No sound reason appears why an assignee should remain unaffected by a provision in the very contract which gave life to the claim he asserts.'

"The California courts are in accord. In *La Rue v. Groezinger*, 84 Cal. 281, the court said at page 283 (24 P. 42, 18 Am.St.Rep. 179): 'if the contract itself provides in term that it is not trans-

ferable, it certainly cannot be transferred, although it otherwise might be so.' And the court said in *Fairbanks v. Crump Irr. etc. Co., Inc.*, 108 Cal. App. 197, at page 205 (291 P. 629, 292 P. 529):

'The contract, as we saw, provided that "any and all moneys due" might be assigned with Fairbanks' "written consent." Appellant rightly says that no such language was needed to make payments due assignable. [52] But the language, having been used, must be given some effect, and it would have none unless it were tantamount to a provision that payments should not be assigned until due, and not then without Fairbanks' written consent. We are aware of no reason why the provision, as so construed should not be given effect.'

"We see no reason to follow the cases from other jurisdictions cited by appellants which seem to hold otherwise."

Counsel for the factor severely criticize the case of *Parkinson v. Caldwell*, *supra*, as being bad law and inconsistent with and contrary to the decision of the Supreme Court in *Johnston v. Landucci*, *supra*. It is significant to note in that connection, that in *Parkinson v. Caldwell*, *supra*, after a petition for rehearing was denied that thereafter a petition for hearing was denied by the Supreme Court of the State of California.

It is well established, that decisions of intermediate courts of appeal of the state, as well as the decisions of the courts of last resort of the

state, are equally binding upon the federal courts, in determining the law of the state when interpreting contracts between the parties. See *Stoner v. N. Y. Life Insurance Co.*, 311 U.S. 464; *Fidelity Union Trust Co. v. Field*, 311 U.S. 169; *West v. American Telephone & Telegraph Co.* 311 U.S. 223. The court in the case of *West v. American Telephone & Telegraph Co.*, *supra*, states the rule on page 237, as follows:

“Where an intermediate appellate state court rests its considered judgment upon the rule of law which it [53] announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Six Companies of California v. Joint Highway District*, ante, p. 180; *Fidelity Union Trust Co. v. Field*, ante, p. 169. Cf. *Graham v. White-Phillips Co.*, 296 U.S. 27; *Wichita Royalty Co. v. City National Bank*, *supra*, 107; *Russell v. Todd*, *supra*. This is the more so where, as in this case, the highest court has refused to review the lower court’s decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner, may hold itself free to modify or reject the ruling thus announced. Vil-

lage of *Brewster v. Hill*, 128 Ohio St. 343, 353; 190 N.E. 766. Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that [54] the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation."

Assuming without conceding that the Supreme Court of the State of California may at some later date overrule *Parkinson v. Caldwell*, *supra*, it is at this time controlling upon this court. It necessarily follows that the purported assignments of the accounts receivable, in view of the provision in the contracts against assignment are void. *Fruehauf Trailer Company and Com-Air, Inc.*, will therefor be ordered to pay any unpaid balances

in their possession to the trustee in bankruptcy. Aetna Factors will be permanently enjoined from prosecuting the actions instituted against Fruehauf Trailer and Com-Air, Inc., brought to recover the accounts receivable assigned to them by the bankrupt herein. Findings of fact, conclusions of law and order heretofore submitted will be signed and entered accordingly.

Dated: October 15, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [55]

cc: Messrs. Craig, Weller & Laugharn. Attention: Mr. William E. Bartley, Attorneys for trustee. Messrs. Quittner, Stutman & Treister and Messrs. Labowe and Ventress, Attention: Mr. George M. Treister, Attorneys for respondent Aetna Factors Co. Mr. Stanley A. Phipps, Attorney for Fruehauf Trailer Co. Mr. Alex D. Fred, Attorney for Com-Air Products, Inc. Messrs. Birnbaum & Hemmerling, Attorneys for Standard Factors Corporation Amicus Curiae. Messrs. Cosgrove, Cramer, Diether & Rindge, Attorneys for Citizens National Trust & Savings Bank of Los Angeles. Amicus Curiae. Mr. George A. Elstein, Attorney for Irving I. Bass, Trustee in Bankruptcy of G.M.C. Tool & Die Company, Bankrupt. [56]

[Endorsed]: Filed October 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE AETNA FACTORS COMPANY

The matter of the Trustee's Petition for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. having come on regularly for hearing before the undersigned Referee in Bankruptcy on the 20th day of February, 1957 and the matter having been continued to the 6th day of March, 1957, the Trustee appearing in person and by and through his counsel, Craig, Weller & Laugharn, William E. Bartley of counsel, Aetna Factors Company appearing by and through their counsel Ventress and Labowe, Com-Air Products, Inc. appearing by and through their counsel, Alex D. Fred, and Fruehauf Trailer Co. appearing by and through their counsel Stanley A. Phipps, and motions to dismiss based on lack of summary jurisdiction having been made by all of the respondents, and evidence both oral and documentary having been offered and received into evidence, and objections to proposed Findings of Fact, Conclusions of Law and Order re Aetna Factors Company having been duly filed with the Court by Ventress and Labowe and Quittner, Stutman & Treister, by [57] George M. Treister, attorneys for Aetna Factors Company, and a motion to reconsider having been duly filed with the Court on June 19, 1957 and various briefs and memoranda of Points and Authori-

ties and briefs of Amicus Curiae having been submitted, and the motion to reconsider having been duly argued before the Court on the 16th day of July, 1957, July 31, 1957 and Aug. 30, 1957, and the Court being fully advised in the premises does hereby make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

That prior to bankruptcy the bankrupt corporation and Fruehauf Trailer Co. entered into several contracts in writing identical in form whereby the bankrupt was to manufacture and supply various bushings to the said Fruehauf Trailer Co. and the Fruehauf Trailer Co. was to pay for the said bushings when invoiced.

II.

That on the 28th day of October, 1955 the bankrupt entered into contracts in writing to manufacture and furnish to Com-Air Products, Inc. various bushings and the said Com-Air Products, Inc., agreed to pay the bankrupt corporation for the said bushings when invoiced.

III.

That the aforesaid contracts and agreements between Fruehauf Trailer Co. and the bankrupt in paragraph 5 thereof all contained the following language: "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any

part of the work be sub-contracted by the vendor without prior written consent of the purchaser."

IV.

That the aforesaid contracts and agreements by and between the bankrupt and Com-Air Products, Inc., all provide in paragraph 15 "Assignment and Subcontracting. This Order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance."

V.

That the bankrupt made an assignment of accounts receivable, including the accounts arising by virtue of the above set forth contracts with Com-Air Products, Inc. and Fruehauf Trailer Co. to Aetna Factors Company.

VI.

That notice of assignment in general terms, not referring to the specific amounts involved, was executed and recorded within the time and manner required by Section 3017 et seq. of the California Civil Code.

VII.

That prior to the institution of the within proceedings Aetna Factors Company made demand on Fruehauf Trailer Co. and Com-Air Products, Inc. that they and each of them pay over the assigned accounts to Aetna Factors Company.

VIII.

That despite the demand of Aetna Factors Company, Fruehauf Trailer Co. paid the sum of \$2,403.98 over to the Trustee, subsequent to bankruptcy, said sum representing what Fruehauf Trailer Co. alleged to be the balance due on accounts which arose by virtue of the above-mentioned contracts and which were assigned to Aetna Factors Company, in addition to the sum of \$863.58 paid to the Trustee by the Marshal of the Municipal Court of the County of Los Angeles received by him pursuant to a garnishment in an action against the bankrupt.

IX.

That Com-Air Products, Inc. now holds the sum of [59] \$5,496.36 which it alleges to be the sum now due and owing on accounts which arose by virtue of the above-mentioned contract on accounts which were assigned to Aetna Factors Company, and Com-Air Products, Inc. refuses to pay the same to the Trustee or to Aetna Factors Company unless and until the Court determines it is indebted.

X.

That a dispute exists between Fruehauf Trailer Co. and Com-Air Products, Inc. and Aetna Factors Company respecting the amounts owed by Fruehauf Trailer Co. and Com-Air Products, Inc.

XI.

That Aetna Factors Company has heretofore caused to be filed certain law suits in the Superior

Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they became due.

XII.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. III and IV above render the assignments to Aetna Factors Company unenforceable as to them.

XIII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIV.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction. [60]

XV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the right of the Trustee to receive payment under the above-mentioned contracts and agreements between the bankrupt and Com-Air Products, Inc. and is therefore not a bona fide adverse claimant.

III.

That Aetna Factors Company does not have possession of the funds in question and is not a bona fide adverse claimant thereto

IV.

That this Court has constructive possession of and control over the money and/or claims involved in the controversies arising in this action.

V.

That the various objections to jurisdiction and motions to dismiss made by Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. were not timely taken and under Section 2-a(7) of the Bankruptcy Act this Court has summary jurisdiction over all matters herein contained.

VI.

That under California State law the above set forth clauses in the contracts between Com-Air Products, Inc. and [61] the bankrupt and Fruehauf Trailer Co. and the bankrupt are enforceable and the Assignment to Aetna Factors Company would be void as to them.

VII.

That under California State law a creditor of the bankrupt could have levied a valid attachment or execution upon the funds owing from Com-Air Products, Inc. and Fruehauf Trailer Co. despite the prior Assignment to Aetna Factors Company and prevail over Aetna Factors Company.

VIII.

That under Section 70-c of the Bankruptcy Act the Trustee is vested with all rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.

IX.

That the funds in the hands of the Trustee and the funds owing from Com-Air Products, Inc. are assets of the within bankruptcy estate, free and clear of the Assignment to Aetna Factors Company.

Order

It Is Hereby Ordered that the objections to the jurisdiction of this Court and motions to dismiss based thereon, made by Aetna Factors Company,

Fruehauf Trailer Co., and Com-Air Products, Inc. are hereby overruled and dismissed; and

It Is Further Ordered that the aforementioned Assignment of accounts receivable made by and between the bankrupt corporation and Aetna Factors Company, a corporation, is void as against the Trustee herein; and [62]

It Is Further Ordered that all sums heretofore collected by the Trustee from Fruehauf Trailer Co. by and under the above-described contracts are assets of the within bankruptcy estate, free and clear of any lien, claim or charge of Aetna Factors Company other than as a general creditor herein when, as and if the said Aetna Factors Company files a proper claim herein; and

It Is Further Ordered that Com-Air Products, Inc. is hereby ordered and directed to pay over to the Trustee the sum of \$5,496.36; and

It Is Further Ordered that Aetna Factors Company has no claim as against Fruehauf Trailer Co. or Com-Air Products, Inc. by and under the aforementioned Assignment of accounts receivable; and

It Is Further Ordered that Aetna Factors Company is permanently enjoined and restrained from proceeding with, or taking action in, the above-described Superior Court Actions; and

It Is Further Ordered that Aetna Factors Company is restrained and enjoined from in any manner, other than the filing of a claim in the within proceedings as provided in Section 57n of the Bankruptcy Act, from taking any action whatever in any manner whatever against the Fruehauf

Trailer Co., Com-Air Products, Inc., or the Trustee herein on any matters relating to the contracts or assignments herein referred to.

Dated: December 23, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed December 23, 1957. [63]

[Title of District Court and Cause.]

PETITION OF AETNA FACTORS COMPANY
FOR REVIEW OF ORDER OF REFEREE
IN BANKRUPTCY DATED DECEMBER
23, 1957

To the Honorable Joseph J. Rifkind, Referee in
Bankruptcy:

The petition of Aetna Factors Company respectfully represents:

I.

Your Petitioner is aggrieved by the order of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, dated December 23, 1957, determining that the Trustee in Bankruptcy had rights superior to Aetna Factors Company with respect to the accounts receivable owing by Fruehauf Trailer Company and Com-Air Products, Inc.

II.

The Referee erred in said order in the following particulars:

A. Regardless of the enforceability of the stipulation against assignment by the obligors of the accounts receivable, the Referee erred in holding that the assignment of accounts was void so as to make the assignment invalid as between the bankrupt and its assignee, Aetna Factors Company.

B. The assignment of the accounts being valid as between the bankrupt and Aetna Factors Company, the Referee erred in holding [64] the assignment to Aetna Factors Company invalid under Section 70c of the Bankruptcy Act as against the bankrupt's Trustee in Bankruptcy.

C. The Referee erred in holding that a creditor of the bankrupt could have, on the date of the bankruptcy, levied upon the Com-Air and Fruehauf accounts receivable theretofore assigned to Aetna Factors Company, and could have thereby obtained lien rights thereto superior to the title of Aetna Factors Company.

D. The Referee erred in holding that the provision against assignment in the Fruehauf contract prohibited an assignment of monies becoming due under the contract.

E. The Referee erred in determining the amounts of money owed upon the said accounts receivable by Fruehauf and Com-Air.

Wherefore, your Petitioner prays that said order of December 23, 1957, be reviewed by a Judge in accordance with the provisions of the Bankruptcy Act, and that upon the said review, an order be entered reversing the order of the Referee and de-

termining that Aetna Factors Company is entitled to the accounts receivable involved in this controversy.

Dated this 30th day of December, 1957.

AETNA FACTORS COMPANY,
By QUITTNER, STUTMAN &
TREISTER,

/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors
Company. [65]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 2, 1958.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW FROM REF-
EREE'S ORDER DATED DECEMBER 23,
1957

To: Hon. William C. Mathes, United States Dis-
trict Judge:

The undersigned Joseph J. Rifkind, a Referee in
Bankruptcy of the above entitled court, does hereby
certify as follows:

Statement of Case

The Trustee in bankruptcy filed a petition herein
to determine the validity of the assignment of cer-
tain accounts receivable to Aetna Factors Company.
The Court made an order on December 23, 1957,

holding the assignments invalid and the respondent Aetna Factors Company alone feeling aggrieved, has filed a petition for review of said order.

Summary of Evidence

The respondents Fruehauf Trailer Company and Com-Air Products, Inc. are engaged in certain defense work. These respondents awarded sub-contracts to the bankrupt which contained provisions expressly prohibiting assignment thereof without their consent. The bankrupt, despite such prohibition, assigned certain accounts receivable to the Aetna Factors Company without obtaining the consent of such respondents. Subsequent to the purported assignment, the bankrupt continued to send invoices in the usual manner and received checks in payment thereof which it in turn endorsed and [67] delivered to the factor. The court is satisfied that the factor knew of the provision in the contracts against assignment and adopted and used this practice to circumvent the prohibition.

There were substantial balances unpaid under these sub-contracts at the inception of bankruptcy. Fruehauf Trailer Company and Com-Air Products, Inc. refused to recognize the purported assignments or to pay the unpaid balances due under such sub-contracts awarded to the bankrupt. The factor thereupon filed suit in the State Court, and this bankruptcy court has enjoined the factors from further prosecution thereof pending the final determination of this proceeding.

Order of Referee in Bankruptcy

The findings of fact and conclusions of law are incorporated in and are made a part of the Order of December 23, 1957, from which the review has been taken.

Questions Presented on Review

The Petition for Review of Aetna Factors Company asserts that the referee erred as follows:

“A. Regardless of the enforceability of the stipulation against assignment by the obligors of the accounts receivable, the Referee erred in holding that the assignment of accounts was void so as to make the assignment invalid as between the bankrupt and its assignee, Aetna Factors Company.

“B. The assignment of the accounts being valid as between the bankrupt and Aetna Factors Company, the Referee erred in holding the assignment to Aetna Factors Company invalid under Section 70c of the Bankruptcy Act as against the bankrupt's Trustee in Bankruptcy. [68]

“C. The Referee erred in holding that a creditor of the bankrupt could have, on the date of bankruptcy, levied upon the Com-Air and Fruehauf accounts receivable theretofore assigned to Aetna Factors Company, and could have thereby obtained lien rights thereto superior to the title of Aetna Factors Company.

“D. The Referee erred in holding that the provision against assignment in the Fruehauf contract

prohibited an assignment of monies becoming due under the contract.

“E. The Referee erred in determining the amounts of money owed upon the said accounts receivable by Fruehauf and Com-Air.”

Documents Transmitted With Certificate

The following documents are transmitted herewith, to wit:

1. Petition of Trustee in Bankruptcy for Order to Show Cause filed February 5, 1957.
2. Order to Show Cause against Fruehauf Trailer Company and Aetna Factors Company issued February 5, 1957.
3. Order to Show Cause v. Com-Air Products, Inc. and Aetna Factors Company issued February 5, 1957.
4. Order to Show Cause v. Aetna Factors Company issued February 5, 1957.
5. Memorandum of Points and Authorities of Aetna Factors Company filed March 11, 1957.
6. Memorandum Opinion dated May 10, 1957.
7. Notice of Motion to Reconsider filed June 20, 1957.
8. Amicus Curiae Brief on behalf of Aetna [69] Factors filed by Birnbaum & Hemmerling on July 31, 1957.
9. Supplementary Memorandum of Aetna Factors filed July 31, 1957.
10. Amicus Curiae Brief on behalf of Aetna

Factors filed by Cosgrove, Cramer, Diether & Rindge on August 5, 1957.

11. Supplementary Amicus Curiae Brief on behalf of Aetna Factors filed by Birnbaum & Hemmerling on August 15, 1957.

12. Trustee's Memorandum of Points and Authorities filed August 29, 1957.

13. Supplemental Memorandum Opinion filed October 15, 1957.

14. Findings of Fact, Conclusions of Law and Order dated December 23, 1957.

15. Petition for Review of Aetna Factors Company filed January 2, 1958.

16. Trustee's Exhibits Nos. 1 and 2.

17. Petitioner's Exhibits A through K.

18. Transcript of hearing on July 31, 1957.

19. Notice of Filing Certificate on Review dated January 24, 1958.

Dated: January 24, 1958.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,

Referee in Bankruptcy.

cc: Messrs. Craig, Weller & Laugharn, Attorneys for Trustee. Messrs. Quittner, Stutman & Treister and Messrs. Labowe and Ventress, Attorneys for Aetna Factors Company. Mr. Arthur W. Schmutz, Attorney for Century Engineers, Inc., and Century Electronics and Manufacturing Corporation. [70]

[Endorsed]: Filed January 24, 1958.

United States District Court, Southern District
of California, Central Division

In Bankruptcy No. 71250-WM

In the Matter of
ZIPCO, INCORPORATED, a California corpo-
ration, Bankrupt.

ORDER ON REVIEW OF REFEREE'S
ORDER OF DECEMBER 23, 1957

Upon the petition for review filed January 2, 1958 by Aetna Factors Company; upon the certificate of Referee Joseph J. Rifkind filed January 24, 1958; and upon the proceedings had before the Referee as appear from his certificate; and it appearing to the Court that:

(1) the "Summary of Evidence" set forth in the Referee's Certificate on Review states: "The respondents Fruehauf Trailer Company and Com-Air Products, Inc. are engaged in certain defense work. These respondents awarded sub-contracts to the bankrupt which contained provisions expressly prohibiting assignment thereof without their consent. The bankrupt, despite such prohibition, assigned certain accounts receivable to the Aetna Factors Company without obtaining the consent of such respondents." [101]

(2) inasmuch as the provisions in the sub-contracts prohibiting assignment were solely for the benefit of the obligors, the assignments were valid under California law as between the bankrupt assignor and the factor assignee [Johnson v. Lan-

ducci, 21 Cal. 2d 63, 67-68, 130 P. 2d 405, 408 (1942); Rosenthal v. Landau, 90 Cal. App. 2d 310, 202 P. 2d 810 (1949); Restatement, Contracts § 176 (1932); 4 Corbin, Contracts 496-497 (1951); 2 Williston, Contracts 1218 (Rev. ed. 1936); cf. Parkinson v. Caldwell, 126 Cal. App. 2d 548, 553-554, 272 P. 2d 934, 938 (1954).]

(3) the Referee's "Summary of Evidence" states: "Subsequent to the * * * assignment, the bankrupt continued to send invoices in the usual manner and received checks in payment thereof which it in turn endorsed and delivered to the factor. The court is satisfied that the factor knew of the provision in the contracts against assignment and adopted and used this practice to circumvent the prohibition," but that no finding was made as to whether or not these transactions were carried on with any intent to hinder, or to delay, or to defraud existing or future creditors of the bankrupt, or any of them [Bankruptcy Act § 67d(2)(d), 11 U.S.C. § 107(d)(2)(d); 4 Collier, Bankruptcy Par. 67.29, 67.37 and pages 372-373 (14th ed. 1940).]

(4) nor was any finding made as to whether or not the bankrupt and the assignee were, as to the fund in question or as to any of the transactions [102] given rise thereto, "co-adventurers", or "co-investors", or "participants in a common enterprise" [compare Consolidated Royalties, Inc. v. Ashton, 132 F. 2d 226, 230 (9th Cir. 1942) with In Re Lathrop, 61 F. 2d 37, 43-44 (9th Cir. 1932), overruled on another ground by Laugharn v. Bank of America, 88 F. 2d 551, 553 (9th Cir. 1937).]

It Is Now Ordered that the Referee's order of December 23, 1957, and the findings of fact and conclusions of law made in support thereof, are hereby set aside; and the matter is hereby recommitting to the Referee with directions:

(a) to hold further hearing on the trustee's petition as to the assignments in question;

(b) to make findings of fact and conclusions of law, inter alia, (1) as to whether or not any of the transactions involved were carried on with any intent to hinder or delay or defraud existing or future creditors of the bankrupt within the meaning of § 67(d)(2)(d) of the Bankruptcy Act; and, if not, (2) as to whether or not the bankrupt and the assignee were, as to the fund in question or as to any of the transactions giving rise thereto, "co-adventurers", or "co-investors", or "participants in a common enterprise"; and (c) to enter an appropriate order or orders thereon.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon

(1) Referee Joseph J. Rifkind;

(2) the attorneys appearing in the cause.

Dated: March 28, 1958.

/s/ WM. C. MATHES,
United States District
Judge. [103]

[Endorsed]: Filed March 28, 1958. Entered March 31, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

At Los Angeles, in said district, on the 25th day of April, 1958.

This matter came on to be heard before the undersigned Referee in Bankruptcy on February 20, 1957 and March 6, 1957, upon the petition of the Trustee in Bankruptcy for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. The Trustee in Bankruptcy appeared in person and by and through his counsel, Craig, Weller & Laugharn by William E. Bartley. Aetna Factors Company appeared by and through their counsel, Ventress and Labowe and Quittner, Stutman & Treister. Com-Air Products, Inc. appeared by and through their counsel, Alex D. Fred; Fruehauf Trailer Co. appeared by and through its counsel, Stanley A. Phipps. Motions to Dismiss based on lack of summary jurisdiction having been made, and evidence both oral and documentary having been offered and received into evidence, and further hearings having been held on July 16, 1957, July 31, 1957 and August 30, 1957, and various briefs and memoranda having been [104] filed by the parties; and the Court having entered its Order dated December 23, 1957, based upon Findings of Fact and Conclusions of Law therein made;

Aetna Factors Company having thereafter, on

January 2, 1958, filed its Petition to review the said Order of the Referee in Bankruptcy dated December 23, 1957; and the said Petition for Review having duly come on for hearing before Honorable William C. Mathes, United States District Judge, on February 24, 1958; and the said Honorable William C. Mathes having entered his "Order on Review of Referee's Order of December 23, 1957," on March 28, 1958, and having set aside the Referee's Order of December 23, 1957, and the Findings of Fact and Conclusions of Law made in support thereof, and having recommitted the matter to the said Referee in Bankruptcy for further proceedings in accordance with the terms of the said Order of March 28, 1958; and a further hearing having been held before the said Referee on April 15, 1958, upon due notice to all interested parties, and the said Trustee in Bankruptcy by and through his attorneys, Craig, Weller & Laugharn by William E. Bartley, and Aetna Factors Company by and through its counsel, Quittner, Stutman & Treister by George M. Treister, having appeared at the said hearing of April 15, 1958, and the Court being fully advised in the premises, now, therefore,

Upon the entire record in these proceedings, and in accordance with the Order of the Honorable William C. Mathes, dated March 28, 1958, the Court does hereby make its Findings of Fact, Conclusions of Law and Order, as follows, in lieu of the Findings of Fact, Conclusions of Law and Order of December 23, 1957:

Findings of Fact

I.

That prior to bankruptcy the bankrupt corporation and Fruehauf Trailer Co. entered into several contracts in writing [105] identical in form whereby the bankrupt was to manufacture and supply various bushings to the said Fruehauf Trailer Co. and the Fruehauf Trailer Co. was to pay for the said bushings when invoiced.

II.

That on the 28th day of October, 1955, the bankrupt entered into contracts in writing to manufacture and furnish to Com-Air Products, Inc. various bushings and the said Com-Air Products, Inc. agreed to pay the bankrupt corporation for the said bushings when invoiced.

III.

That for a period of a number of months prior to the filing of these bankruptcy proceedings, Aetna Factors Company and the bankrupt corporation engaged in factoring transactions whereby the said bankrupt corporation sold and assigned to Aetna Factors Company various of its accounts receivable, including the accounts receivable owing by Fruehauf Trailer Co. and Com-Air Products, Inc. which are involved in this litigation. That the said Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable were assigned to Aetna Factors Company on a non-notification basis, the obligor on the said accounts not being advised that the assign-

ments had been made. That Aetna Factors Company paid to the bankrupt corporation fair consideration for the accounts receivable sold and assigned as hereinbefore set forth.

IV.

That notice of intention to assign accounts receivable, in accordance with the provisions of Sections 3017 et seq. of the California Civil Code, was duly executed and filed by Aetna Factors Company and the bankrupt corporation, and within the time specified by the said provisions of the California Civil Code. Said notice of intention to assign accounts receivable was in general terms, as permitted by the said provisions of the California [106] Civil Code.

V.

That the aforesaid contracts and agreements between Fruehauf Trailer Co. and the bankrupt in paragraph 5 thereof all contained the following language: "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any part of the work be sub-contracted by the vendor without prior written consent of the purchaser."

VI.

That the aforesaid contracts and agreements by and between the bankrupt and Com-Air Products, Inc. all provide in paragraph 15 "Assignment and Subcontracting. This Order may not be assigned or subcontracted in whole or in any part nor may any

assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance."

VII.

That despite the foregoing provisions prohibiting the assignment of the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable, the bankrupt did sell and assign the said accounts receivable to Aetna Factors Company as hereinabove set forth.

VIII.

That Fruehauf Trailer Co. and Com-Air Products, Inc. have never consented to the assignment of the monies owed by them to Aetna Factors Company; that prior to the institution of these proceedings by the Trustee in Bankruptcy, Aetna Factors Company made demand upon Fruehauf Trailer Co. and Com-Air Products, Inc. that they, and each of them, pay over the assigned accounts to Aetna Factors Company, but that Fruehauf Trailer Co. and Com-Air Products, Inc. refused to honor the said demand made by Aetna Factors Company. [107]

IX.

That a dispute exists between Fruehauf Trailer Co. and Com-Air Products, Inc. and Aetna Factors Company respecting the amounts owed by Fruehauf Trailer Co. and Com-Air Products, Inc.

X.

That Aetna Factors Company has heretofore

caused to be filed certain law suits in the Superior Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they become due.

XI.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. V and VI above render the assignments to Aetna Factors Company unenforceable as to them.

XII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIII.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction.

XIV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

XV.

That the assignments of the Fruehauf Trailer Co. and [108] Com-Air Products, Inc. accounts receivable to Aetna Factors Company were made for fair and valuable consideration, as above set forth, and were not made with intention to hinder, delay or defraud existing or future creditors of the bankrupt corporation, or any of them. That the said assignments were, on the contrary, made as part of routine factoring transactions.

XVI.

That the bankrupt corporation and Aetna Factors Company were not, as to the fund in question, or as to any of the transactions giving rise thereto, co-adventurers, co-investors or participants in a common enterprise. The relationship between the bankrupt and Aetna Factors Company was merely that of assignor and assignee of the accounts receivable in question; that there was no relationship other than as said assignor and assignee with respect to the monies in question, or at all.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the

caused to be filed certain law suits in the Superior Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they become due.

XI.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. V and VI above render the assignments to Aetna Factors Company unenforceable as to them.

XII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIII.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction.

XIV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

XV.

That the assignments of the Fruehauf Trailer Co. and [108] Com-Air Products, Inc. accounts receivable to Aetna Factors Company were made for fair and valuable consideration, as above set forth, and were not made with intention to hinder, delay or defraud existing or future creditors of the bankrupt corporation, or any of them. That the said assignments were, on the contrary, made as part of routine factoring transactions.

XVI.

That the bankrupt corporation and Aetna Factors Company were not, as to the fund in question, or as to any of the transactions giving rise thereto, co-adventurers, co-investors or participants in a common enterprise. The relationship between the bankrupt and Aetna Factors Company was merely that of assignor and assignee of the accounts receivable in question; that there was no relationship other than as said assignor and assignee with respect to the monies in question, or at all.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the

right of the Trustee to receive payment under the above-mentioned contracts and agreements between the bankrupt and Com-Air Products, Inc. and is therefore not a bona fide adverse claimant.

III.

That the various objections to jurisdiction and motions to dismiss made by Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. were not timely taken and under Section 2 a (7) of the Bankruptcy Act this Court has summary jurisdiction over all matters herein contained. [109]

IV.

That the provisions in the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable prohibiting the assignment thereof were solely for the benefit of the obligors of the said accounts; the assignments of the said accounts in contravention of the provisions against assignment were, under California law, valid as between the bankrupt assignor and Aetna Factors Company, as assignee.

V.

That accordingly, on the date of bankruptcy, a levying creditor of the bankrupt could not have obtained rights in the assigned accounts superior to those of Aetna Factors Company; the Trustee in Bankruptcy, therefore, obtained no right to the assigned accounts under Section 70c of the Bankruptcy Act as against Aetna Factors Company.

VI.

That the monies collected upon the said Fruehauf

Trailer Co. and Com-Air Products, Inc. accounts receivable by the Trustee in Bankruptcy are not assets of this bankruptcy estate, but are property of Aetna Factors Company.

VII.

That the assignments of the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable by the bankrupt to Aetna Factors Company did not constitute transfers made with intent to hinder, delay or defraud existing or future creditors of the bankrupt, or any of them, within the meaning of Section 67d(2) (d) of the Bankruptcy Act, or any other provision of the Bankruptcy Act or the laws of the State of California.

VIII.

The bankrupt and Aetna Factors Company were not, as to the accounts receivable in question or as to any of the transactions giving rise thereto, or at all, co-adventurers, co-investors, or [110] participants in a common enterprise.

IX.

The Trustee's Petition for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. should be denied, and the Trustee should turn over to Aetna Factors Company all monies collected by him upon the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable.

Upon the foregoing Findings of Facts and Conclusions of Law, it is

Ordered, Adjudged and Decreed:

1. That the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable, which are the subject of this controversy, are property of Aetna Factors Company and do not constitute assets of this bankruptcy estate.

2. That the monies collected by the Trustee in Bankruptcy upon the said Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable belong to Aetna Factors Company and shall be turned over to it by the said Trustee.

3. That Aetna Factors Company may take such further steps as in its discretion appear appropriate, in a court of competent jurisdiction, to establish as against Fruehauf Trailer Co. and Com-Air Products, Inc. the amounts owing on the accounts receivable assigned by the bankrupt to Aetna Factors Company.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Approved as to form:

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Trustee in
Bankruptcy. [111]

[Endorsed]: Filed April 25, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL RE
AETNA FACTORS CO.

Notice Is Hereby Given that the Trustee in Bankruptcy in the above-entitled matter, Irving I. Bass, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order on Review of Referee's Order of December 23, 1957 entered by the District Court of the United States for the Southern District of California, Central Division, on March 31, 1958, and dated March 28, 1958.

Dated: April 30th, 1958.

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Trustee. [112]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure, Irving I. Bass, appellant and Trustee in Bankruptcy for the Estate of Zipco, Inc., a California corporation, hereby designates for inclusion in the record on appeal to the United States Court

of Appeals for the Ninth Circuit, the following documents, said appeal having been taken by Notice of Appeal filed April 30, 1958:

1. Petition for Arrangement under Chapter XI of the Bankruptcy Act filed April 5, 1956;

2. Order of Reference referring the matter to Referee Joseph J. Rifkind dated April 5, 1956;

3. Order adjudicating the debtor corporation a bankrupt, dated May 7, 1956;

4. Order appointing Irving I. Bass Trustee in Bankruptcy;

5. Petition for Order to Show Cause of Trustee in Bankruptcy, dated February 5, 1957;

6. Order to Show Cause against Fruehauf Trailer Co. and [114] Aetna Factors Co., issued February 5, 1957;

7. Order to Show Cause against Com-Air Products, Inc. and Aetna Factors Co. issued February 5, 1957;

8. Order to Show Cause vs. Aetna Factors Co. filed February 5, 1957;

9. Memorandum of Points and Authorities re Aetna Factors Co. filed March 11, 1957;

10. Memorandum Opinion of Referee dated May 10, 1957;

11. Notice of Motion to Reconsider filed June 10, 1957;

12. Supplemental Memorandum of Aetna Factors Co. dated July 31, 1957;

13. Trustee's Memorandum of Points and Authorities filed August 29, 1957;

14. Supplemental Memorandum Opinion of Referee filed October 15, 1957;

15. Findings of Fact, Conclusions of Law and Order dated December 23, 1957;

16. Petition for Review of Aetna Factors Company filed January 2, 1958;

17. Trustee's exhibits No. 1 and 2;

18. Petitioner's exhibits "A", "J", "K";

19. Transcript of Hearing of July 31, 1957;

20. Referee's Certificate on Review dated January 24, 1958;

21. Memorandum of Aetna Factors Co. on Petition to Review Order of Referee in Bankruptcy dated December 23, 1957, filed with the United States District Court on or about January 30, 1958;

22. Trustee's Memorandum of Points and Authorities in Opposition to Petition for Review of Order of Referee dated December 23, 1957, filed on or about February 10, 1958;

23. District Court's Order on Review of Referee's Order of December 23, 1957, dated March 28, 1958 and entered on [115] March 31, 1958;

24. Findings of Fact, Conclusions of Law and Order (Trustee vs. Aetna Factors Co.) signed and entered on or about April 25, 1958;

25. Notice of Appeal filed April 30, 1958.

Dated: April 30, 1958.

CRAIG, WELLER &
LAUGHARN,

/s/ By WILLIAM E. BARTLEY,
Attorneys for Appellant and Trustee in Bank-
ruptcy for Zipco, Inc., a California corpora-
tion. [116]

Affidavit of Service by Mail Attached. [117]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now Irving I. Bass, appellant and Trustee in Bankruptcy for the estate of Zipco, Inc., a California corporation, and presents his points on which he intends to rely in support of his contention that the District Court erred:

1. Erred in paragraph (2) of the "Order on Review of Referee's Order of December 23, 1957" in finding and ruling as a matter of law that "Inasmuch as the provisions in the sub-contracts prohibiting assignment were solely for the benefit of the obligors, the assignments were valid under California law as between the bankrupt assignor and the factor assignee";

2. Erred in ordering that the Referee's Order of December 23, 1957 and the Findings of Fact and Conclusions of Law made in support thereof be set aside;

3. Erred in not affirming and adopting each and every of the Referee's Findings of Fact and Conclusions of Law of December 23, 1957;

4. Erred in not affirming the Referee's Order of [118] December 23, 1957 and in not dismissing the Petition for Review;

5. Erred in recommending the matter to the Referee with directions to hold a further hearing;

6. Erred in recommending the matter to the Referee with directions to make Findings of Fact and Conclusions of Law as to whether or not any of the transactions involved were carried on with any intent to hinder, delay or defraud existing or future creditors of the bankrupt within the meaning of Section 67(d) (2) (d) of the Bankruptcy Act and as to whether or not the bankrupt and the assignee were, as to the fund in question, or as to any of the transactions giving rise thereto "co-adventurers" or "co-investors" or "participants in a common enterprise", and in ordering the Referee to enter appropriate Order or Orders based upon the said Findings of Fact and Conclusions of Law.

Dated: April 30, 1958.

CRAIG, WELLER &
LAUGHARN,

Attorneys for Appellant and Trustee in Bankruptcy, Irving I. Bass, for Zipco, Inc., a California corporation. [119]

Affidavit of Service by Mail Attached. [120]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter:

A. The foregoing pages numbered 1 to 120, inclusive, containing the original:

(Certified copy) Order approving appointment of Trustee

Petition for Order to Show Cause

Order to Show Cause against Fruehauf Trailer Co.

Order to Show Cause against Com-Air Corporation

Order to Show Cause against Aetna Factors Co.

Memorandum of Points and Authorities in support of Aetna Factors Co., on order to show cause

Memorandum Opinion re Order to Show Cause v. Aetna Factors, Fruehauf Trailer Company and Com-Air Products, Inc.

Notice of Motion to Reconsider

Supplementary Memorandum of Aetna Factors Company

Trustee's Memorandum of Points and Authorities in support of Memorandum Opinion re Aetna Factors Co.

Supplemental Memorandum of Opinion — Order

to Show Cause v. Aetna Factors, et al. re Assignment of Accounts Receivable

Findings of Fact, Conclusions of Law and Order re Aetna Factors Company, filed 12/23/57

Petition of Aetna Factors Company for Review of Order of Referee in Bankruptcy dated December 23, 1957

Certificate on Review from Referee's order dated Dec. 23, 1957

Memorandum of Aetna Factors Company on Petition to Review Order of Referee in Bankruptcy, dated 12/23/57

Trustee's Memorandum of Points and Authorities in opposition to Petition for Review of Order of Referee dated 12/23/57

Order on Review of Referee's Order of December 23, 1957

(Certified copy) Findings of Fact, Conclusions of Law and Order (Trustee v. Aetna Factors Company). filed 4/25/58

Notice of Appeal

Appellant's Designation of Contents of Record on Appeal

Appellant's Statement of Points on Appeal.

B. Trustee's Exhibits 1 and 2; Petitioner's Exhibits A, J and K.

C. One volume of Reporter's Transcript re Motion to Reconsider Court's Decision announced in Memorandum Opinion May 10, 1957, made on Wednesday, July 31, 1957, etc.

I further certify that my fee for preparing the

foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: June 2, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By WM. A. WHITE.
 Deputy Clerk.

District Court of the United States, Southern
District of California, Central Division

In Bankruptcy, No. 71,250-WM

In the Matter of
ZIPCO, INC., Bankrupt.

MOTION TO RECONSIDER COURT'S DECISION ANNOUNCED IN MEMORANDUM OPINION MAY 10, 1957, MADE ON WEDNESDAY, JULY 31, 1957, AT 11:00 A.M.

Before the Honorable Joseph J. Rifkind, Referee in Bankruptcy.

Appearances: For the Trustee: Craig, Weller & Laugharn, By: William E. Bartley, Esq. For Aetna Factors: Quittner, Stutman & Treister and Labowe & Ventress, By: George M. Triester, Esq., and R. B. Labowe. For Amicus Curiae: Birnbaum & Hemmerling, By: Clifford A. Hemmerling, Esq. [1]*

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Wednesday, July 31, 1957, 11:00 A.M.

The Referee: Are you ready to proceed in the Zipco matter?

Mr. Triester: Ready, your Honor.

Mr. Bartley: Ready for the Trustee.

The Referee: The status of this matter now is, of course, that the findings of fact and conclusions of law have been submitted by the attorney for the Trustee, and objections and exceptions thereto have been filed, and they have been accompanied by a motion for rehearing or rather reconsideration, I believe is the proper term.

In other words, it is not proposed to introduce additional evidence, but merely a reconsideration and further argument.

Mr. Triester: That is correct—strictly legal matters.

When the matter was first called, Mr. Hemmerling asked leave to be heard in connection with the matter and perhaps to file points and authorities as *amicus curiae*. He would like to address the Court briefly on that.

The Referee: All right.

Mr. Triester: I would like to point out to the Court why we have taken such an unusual step as moving to reconsider after the Court has considered the matter so [2] thoroughly already, and written a memorandum opinion, showing obvious familiarity with all of the authorities.

As I say, I think we are going to be in agreement with the Court on almost every important

point except one, which, I think, requires a different conclusion.

The importance of this case is tremendous. Since being retained by Aetna Factors, we have been contacted by probably as many as half a dozen either factoring firms or banks or attorneys for banks. I might just name some of them who have contacted us with the request that they be allowed to file *amicus curiae* briefs.

We advised each of them, after discussing the matter, to see if they have anything to add that had not occurred to us, or anything new—we, of course, could not tell them not to file briefs, but we felt that we had the arguments sufficiently under control, and so forth, that it would be more of a burden to the Court than an aid to the Court.

I would like to name some of them who have contacted us. The Bank of America is one; the Citizens Bank, both of which do a considerable amount of accounts receivable financing.

We were contacted by other factors, but not by Standard Factors, which is Mr. Hemmerling's client.

In the case of Standard Factors we requested that they do ask leave of Court to file an *amicus curiae* brief [3] for the reason, in the first place, they had a little bit different approach to the problem. Their conclusions were the same, but their approach was different, and I thought it would be helpful to the Court.

In the second place, because of the distinguished reputation of Mr. Birnbaum, of the firm of Birn-

baum and Hemmerling, we thought because of his obvious standing in the field of commercial transactions and being head of a committee of the ABA involving commercial transactions, we felt with respect to the matter of this specific situation in this particular case we did ask them to prepare such a memorandum.

I have already had a copy of the memorandum given to Mr. Bartley this morning, and I would join in Mr. Hemmerling's request that they be allowed to file a memorandum after my argument. Also, if Mr. Hemmerling feels something else should be entered by way of oral argument, I should also request that the Court hear his oral argument.

Certainly the amount in controversy here doesn't justify reconsidering or taking more of this Court's time after the full hearing already had, nor does it justify the filing of amicus curiae briefs, but the principle involved, which I will attempt to tell the Court, a decision to this effect will completely make impossible non-notification factoring, a very common financing device, [4] and a very useful financing device. Not only will it make non-notification factoring impossible where the factor does not advise the obligor on account, because of the impairment of the credit standing of the assignor, but it will put a handicap on notification factoring, because the factor can never be sure if there is such a non-assignability clause; he may have to investigate, and it will seriously burden notification factoring and probably make it impossible as to notification factoring.

This is a very bad result to reach if it is compelled by the authorities, for reasons that Mr. Hemmerling will allude to if allowed to file *amicus curiae* memoranda.

Mr. Hemmerling: May I add something? The fact that Mr. Birnbaum is not here today is not an indication that he doesn't feel this matter is important. His participation in this unfortunately is via Transatlantic telephone, because he is currently in Europe at the Bar convention, so that I am substituting in his place, so to speak.

Mr. Bartley: I have no objection to any person or party filing an *amicus curiae* in any matter which is presented in court. The law is the law, regardless of who presents the law.

I have before me a copy of the brief of Birnbaum and Hemmerling; I haven't had an opportunity to read it but I would like to have an opportunity to answer it, and I doubt that there is time in the courtroom to adequately [5] read and digest the material contained in the brief.

I was also served with a copy of supplementary points and authorities of Aetna Factors.

Mr. Triester: May I hand mine to the Court? It is submitted basically, your Honor, so that it can be referred to in my oral argument.

The Referee: Very well. Standard Factors will be permitted to appear and be heard as *amicus curiae*.

I want to say this before you start, Mr. Triester, that Mr. Bartley on behalf of the Trustee and Mr. Labowe on behalf of Aetna came into court thor-

oroughly prepared and ably presented their matter. I want to particularly stress insofar as Mr. Lohwe is concerned, that he did an excellent lawyer-like job, and I emphasize that for this reason: I have always contended that any good lawyer with the proper amount of preparation can handle a bankruptcy matter just as competently as a so-called bankruptcy expert, and I didn't want to leave any impression that he didn't do anything that any bankruptcy expert could have done. He presented his case thoroughly and well.

I feel because he is a young man that the Court should go out of its way to make that comment, and the fact that the Court had this matter under submission for some time indicates the effectiveness of his argument and briefs better than anything that can be said.

He raised some very serious questions of law. There [6] weren't any questions of fact; the questions of fact were very simple, it was simply a question of law.

The only question of fact that is presented by the motion to reconsider is whether or not the amount that was due and payable from Com-Air and Fruehauf was a correct amount.

If the matter had been determined in favor of the factors, it would not have been necessary to determine the amount, because the factors have actions pending against both obligors. However, since it was determined in favor of the Trustee, and the Trustee's counsel stipulated those were the correct

amounts, the Court made that decision, so I don't think that is too important.

I think we should narrow and restrict ourselves and confine ourselves to the questions of law involved here.

It is true it involves a very serious situation, because so many, many bankrupt estates will be depleted if these assignments are considered valid, where there is a provision in the purchase order against assignment.

On the other hand, many factors who have purchased accounts receivable with such provisions against assignment will sustain very serious losses, so it is very serious both ways, and for that reason the Court did give it careful consideration, and read not only the cases which were cited by counsel, but innumerable cases which neither of them had cited, and I spent six or seven evenings [7] in connection with the independent research of the matter.

Of course, it does not affect the assignment or factoring of accounts, nor does it involve the recording of notice under Section 3017 of the Civil Code. The question is simply whether or not an assignment of accounts receivable under purchase orders which expressly prohibit the assignment of such accounts is valid as against the creditors of the bankrupt estate, represented by the trustee in bankruptcy, where the money had not yet been paid to the bankrupt or to its alleged assignee prior to bankruptcy. That was the thinking of the Court, and the Court has obviously indicated in its

opinion heretofore filed that it had reached, the conclusion that under purchase orders of this type containing provisions against assignment, that a creditor could have levied an execution, upon Fruehauf and Com-Air, and therefore the trustee occupying the status of an actual or hypothetical creditor under Section 70 of the Bankruptcy Act, is entitled to the unpaid money which was in possession of such obligors when bankruptcy was filed.

I think the opinion of the Court indicated that, but if it didn't, that is the reason for the ruling.

Mr. Triester: I quite understand the rationality of the Court.

I would like to say one more thing by way of [8] emphasizing the importance of the problem, and that is such a large percentage, particularly of defense contracts contain this provision, that we do have a problem of very great magnitude.

The Referee: We can take cognizance of the fact that there are other bankrupt estates in which there are defense contracts which have the same clause in the contracts and which also have been factored.

Mr. Triester: I would say most of them do.

The Referee: And the Court has now under submission several of those involving that situation.

Mr. Triester: I think the amount that will be spent on attorneys fees will far exceed, I am sure, before this litigation is concluded—because I assume that the Trustee is just as interested in this point as we are—will be more than the amount in controversy here.

In any event, I would like to first outline to the Court the areas of agreement that we have, with the Court's opinion, and which we do not challenge here.

In the first place, I quite agree with the Court's decision on summary jurisdiction. I have no doubt that this Court has summary jurisdiction of this controversy.

As a matter of fact, even if the Court did not have, were it within our province to waive the objection to summary jurisdiction, we should do so in a problem that pertains to factoring so that it should be presented here [9] in the first instance.

So we have no quarrel with the summary jurisdiction holding.

The next point we agree with the Court is the validity of this stipulation against assignment in the Fruehauf and Com-Air purchase orders, and the effect to be given it in a proceeding of this sort is a matter to be determined by state law. The Court so stated on page 4 of its opinion.

The Referee: As between the parties.

Mr. Triester: As between the parties the state law will govern, and the Bankruptcy Act is important because it incorporates and gives effect to that state law under Section 70-c of the Bankruptcy Act.

The Referee: In other words, *Erie vs. Tompkins*, which reverses *Swift vs. Tyson*, simply is to the effect that when a Federal Court, and the same, of course, applies to a Bankruptcy Court, is interpreting a contract, that the law in the particular

state where the contract has been entered into is the prevailing law. Of course, neither *Erie vs. Tompkins* or any of those cases involved the rights of a trustee in bankruptcy in relation to this situation.

To make that clear, for instance, an unrecorded chattel mortgage might be valid as between the parties, and certainly if it is not recorded it is void as to the [10] trustee in bankruptcy, and similar situations.

Mr. Triester: That is right.

The Referee: And similar situations of that sort: assignments of accounts receivable may be valid between the parties, if notice is not recorded it may be void, and so on and so forth.

Mr. Triester: We agree with that. The Bankruptcy Act governs, but to the extent that it looks to state law in this controversy, we must look to state law and I think here the state law will control, there is no doubt about it.

We are in agreement with the Court's next holding, namely, that we agree that the Court correctly interprets the trustee lien creditor status on the date of bankruptcy on page 5 of the opinion.

At this point I think this may be superfluous but I think this is the only provision under which the Trustee can prevail, under Section 70-c of the Bankruptcy Act. I would like to just emphasize again what the Trustee gets. He gets title to all property, and it is no longer necessary that the property be in the possession of the Court at all, and under Section 70-c of the Bankruptcy Act the

Trustee is vested with all rights, remedies and powers of a creditor then holding a lien thereon by legal and equitable proceedings, whether or not such a creditor actually exists, which refers to the date of bankruptcy. [11]

In other words, as of the date of bankruptcy if a creditor of the bankrupt could get a lien on the property involved in the controversy, the Trustee must prevail under Section 70-c.

I don't know. Perhaps I may go further in following *Constance vs. Harvey* than the Court does.

Constance vs. Harvey is a wholehog decision, and I have urged and relied on that case when I have been on the other side of these controversies, and I don't intend to back away from *Constance vs. Harvey* now.

If a hypothetical creditor, whether or not there be one, could have on the date of bankruptcy garnisheed *Fruehauf* or *Com-Air* and prevailed over *Aetna Factors*, then the Court's decision is correct. I think that it is true that if the hypothetical creditor could have so garnisheed on the date of bankruptcy, you must look to the state law, because it is the law of the State of California that determines what a garnisheeing credit could get on the day of bankruptcy which controls. Therefore, I say the state law will determine this controversy, because there is no dispute at all but that Section 70-c as applied here in the state law is correctly construed. It is a California state law, of course, because this is the law which gives substance to controversies arising in this jurisdiction.

Finally, then, we agree with the Court's holding [12] the statement of the general proposition that an agreement which is binding between the parties may under certain circumstances be invalid as against the creditors of one of the parties. We don't dispute that at all; we are in agreement.

There is one point where we disagree with the Court's conclusion, but before I get to that I would like to make one point clear for the purpose of this motion to reconsider.

We want to prevail on the real issue in controversy here, namely, whether or not a non-assignability clause in a purchase order is valid and enforceable when the assignor goes into bankruptcy. This is not a dispute between the factor and the obligor, but it is a dispute between the factor and the trustee in bankruptcy of the assignor. We want to prevail on that point. We want to be able to convince the Court we are correct, despite assignments in violation of a non-assignability clause in a purchase order, and that the assignor, if he goes into bankruptcy, his Trustee in bankruptcy does not prevail against the factor, assuming, of course, that an assignment was made for valid consideration, and there has been recordation of notice of intention to assign under Section 3440, and so forth.

There are a couple of technical points on which we could make a good legal argument to the Court, which [13] would enable us to win at least part of this lawsuit, but would not justify the spending of the money to win it.

I think in the controversy in the Parkinson

case we could distinguish the language in the Com-Air and the Fruehauf purchase orders, and I think——

The Referee: The Court pointed out that there was a very decided difference in the language, which was one of the many things that concerned the Court very much. One of them was very specifically related to the non-assignability of the proceeds, as well as the contract. The other did not go quite so far, and I think I commented upon that, in my opinion.

Mr. Triester: We don't wish to press that point here. I think as a lawyer I owe my client the obligation of preserving the point, but that is not why we are here asking the Court to reconsider the decision; we are out for the main issue in the case.

I think there is also another point—I believe it is the law of the State of California that when provisions of this sort are inserted in lengthy documents in fine print, the Supreme Court of the State of California, I believe, the Supreme Court has held it is not even enforceable between the parties. This again we don't wish to make an issue of before this Court, for the reason that all they would do in the future is increase the size of the [14] type, and we would have won nothing in the long run, so I merely call that to the Court's attention. We are after the whole apple in this case; the basic issue.

We want to win on the ground that even if we concede this is between Aetna Factors and Frue-

hauf and Com-Air that they can enforce their non-assignability clauses against Aetna Factors and insist upon paying the Trustee rather than us; in other words, we can still disregard the non-assignability clause in a case between Aetna and the bankrupt or the bankrupt's Trustee in bankruptcy, and we believe we will convince the Court in this case that the Trustee has no greater rights than the bankrupt had at the date of bankruptcy.

The way this case has worked out, the Trustee literally stands in the shoes of the bankrupt, because the bankrupt's creditors had no greater right than the bankrupt did on that date.

I might say this: The Court might wonder about this point—is this a new concept with me as to the enforceability of non-assignability clauses? I would say it is not.

I was before this Court in the Delta Air case. The Delta Air accounts receivable from North American contained a non-assignability clause, and we made no point of it to the Court, representing the Trustee, because at that time I was not aware of this Court's decision in [15] the Zipco case. I don't believe it had been rendered.

It would be my independent conclusion it was not enforceable in a suit between a Trustee and the factor.

North American might have been able to pay the Trustee, but if they had, if Aetna were to claim it from the Trustee, it would come to the Trustee impressed with all of the equitable rights between the assignor and assignee, so this is not a new

position, because of the exigencies in this particular case require that position.

This is a matter which I felt strongly about for quite some while.

I may be wrong, but I interpret one of Mr. Bartley's proposed findings, and I refer to No. 6, I believe that Mr. Bartley, at least in his finding, concedes my point, namely as between the assignor and assignee, as between the bankrupt and Aetna the assignment is good despite it being made in violation of a non-assignability clause.

That conclusion of law says: "That under California State Law the above set forth clauses in the contracts between Com-Air Products, Inc. and the bankrupt and Fruehauf Trailer Company and the bankrupt are enforceable in the assignment to Aetna Factors Company would be void, save and except as between the bankrupt and Aetna Factors Company."

Now, I am willing to almost concede that it could be enforceable in this instance or in a great many cases. [16] The obligor on the account could insist on the enforceability of the non-assignability clause, but once you concede to me it is not enforceable as between a bankrupt assignor and the factor, I think the legal decision must go the other way for the reasons I am going to come to in just a moment.

The Referee: Of course, the findings of fact and conclusions of law and order submitted by Mr. Bartley are not necessarily those which the Court will sign, and I think all of you know that this Court has on occasion prepared its own findings

and in many instances greatly revised the findings submitted.

Mr. Triester: I doubt very much, too, if the Court could adopt it in our favor. I believe that the Court's judgment would be inconsistent, if the Court said in its opinion it may be valid between the parties and still invalid between——

The Referee: I don't think I decided that in this matter.

Mr. Triester: I will withdraw that.

This brings me back to the place where we agree and disagree at the same time.

We agree with the general proposition, as the Court has stated, that it may be valid between the parties and invalid as against the creditors for one of the parties, but we say this: In the State of California, absent [17] some special statute, a levying creditor gets only his debtors' rights when he makes his levy. That is to say if there are equitable rights in favor of "X" in a piece of property and a creditor levies on that property, he gets only his debtor's rights, whether or not he had notice of these equitable rights or not, in the absence of a special statute.

What are these special statutes? We have a lot of them: Failure to record a chattel mortgage makes it void as against creditors, because the statute says so, even though it is good as between the parties; failure to record, failure to record an intention to assign accounts receivable makes an assignment void as against the creditors of the assignor, even though it is valid between the parties.

In this case that problem doesn't exist; that is not involved in our controversy.

The notice was recorded properly under Section 3440, failure to give notice of a bulk sale, creditors of the seller—is void against between the parties.

Failure to give notice of a manual delivery, the transaction between the parties is perfectly valid, but the creditors can set it aside.

Take another example, conditional sales contracts. Suppose a creditor has no notice of a conditional sales contract in existence, if he levies on that property in [18] the possession of the debtor his levy reaches only his debtor's right; he gets no greater right than the conditional buyer had. Why? Because there is no statute in this state, unlike in states that have a uniform conditional sales act, but there is no statute in the State of California, I think, except in the case of—equipment, there is no statute requiring conditional sales contracts to be recorded or notice thereof be given to anybody, so a debtor whose property is subject to a conditional sales contract, if one of his creditors levies on it, he gets only his creditor's rights, and that is exactly the same situation we have in this state in connection with accounts receivable in violation of a non-assignability clause. There is no special statute, I will submit in a moment, nor is there any law which gives a levying creditor on an account receivable that has been assigned any greater right than the assignor had at the time of levy, and I think that is the crux of this case, because that tests the trustee in bankruptcy's right.

Could a levying creditor under date of bankruptcy prevail over Aetna when it levied on Zipco's accounts receivable from Com-Air, and the answer is no, he could not, because as between Zipco and Aetna, Zipco had nothing and Aetna had all the ownership to the accounts.

To be sure, Com-Air may have had some right to refuse to pay Aetna directly, but if they had paid Zipco, Zipco [19] of course, would have to turn it over to Aetna, because there is no special statute giving the levying creditor, and therefore, the trustee in bankruptcy, any greater right than Zipco had at the date of bankruptcy.

Now, the matter boils right down to this: As between Aetna and Zipco on the day of bankruptcy, what right did Zipco have or what right did the creditor of Zipco have?

We think the authorities in this state, there are three, and they are directly in point. There are others which discuss the problem, but which are not directly in point, but the only three cases in this state, I submit, which involve a dispute as between the assignor and assignee are Johnston vs. Landucci, O'Neill vs. O'Malley and the Rosenthal, I think, is the case, Rosenthal against Landau.

Those three cases involve assignments of causes of action in violation of non-assignability clauses, and they involve a fight over the accounts as between the assignor and the assignee or their representatives, and in each of those three cases the Court upheld the right of the assignee, despite the violation of the non-assignability clause.

Now, what is the distinction? Before I pass on, I would like to mention that *Parkinson vs. Caldwell* is not in point. I would like to say those three cases not only are the law of the State of California, but they seem to [20] be the general rule in most of the states.

On page 6 of my supplementary memorandum I have a quotation from 148 ALR.

The Referee: I read the article at the time.

Mr. Triester: At page 6, at the bottom of my memorandum there is a quotation from 5 Cal. Jur. 2d, summarizing the State of California law and *Witkins'* most recent summary.

The Referee: I didn't read *Witkins*.

Mr. Triester: It is to the same effect as Cal. Jur. 2d.

I would like to emphasize one authority that I am sure the Court has read, but I would like to emphasize it, because it deals with the problem as to what are the rights between the assignor and assignee assuming that the obligor on the account, *Com-Air and Fruehauf*, can insist on enforcing the non-assignability clause.

Williston says, and I have quoted from his treatise in the matter, and the quotation is on page 4 of my memorandum:

"A prohibition of assignment or a condition constricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the legal or equitable rights of the assignor and assignee as between themselves. Accordingly, if the assignor should

collect the assigned claim, he [21] would be bound to pay what he had collected to the assignee."

Namely, at the time Zipco or their representative, the Trustee in bankruptcy, should collect the assigned claim, it would be bound to pay what he collected to the assignee. That is why I say we can both enforce the non-assignability clause as to the parties under the original contract. Zipco and Com-Air may be able to insist upon performance, although in this state they couldn't even do that, I take it.

If their obligation would not be increased by paying directly to the assignee—I could probably point out a lot of situations where the obligor couldn't insist on the enforcement of the non-assignability clause, but assuming that Com-Air and Fruehauf did insist in this case, because of their obligation to the assignee—assuming that they could enforce it, they would still, according to Williston, be bound to pay what they collected to the assignee, and it may be that a practical matter would be that we would have to look to the Trustee in bankruptcy to collect these accounts or mechanically set it up in that way, although, I take it, Com-Air and Fruehauf have no reluctance to pay the assignee the undisputed amounts directly, if the Court should adjudicate that the assignee is entitled to these accounts.

The Referee: That wasn't their position here. They [22] took the position these provisions were necessary to give them the control and supervision by way of offsets and rejects, and prevent getting

irresponsible persons in on the contract, and I suppose it is very much the same object that they have that the Government has in Section 203, Title 31 of the United States Code.

Mr. Triester: There is a tremendous overriding policy in the Government. I think the Martin case is in our favor.

The Referee: The Martin case simply says where the Government has already paid the money for distribution amongst the lien holders, that they didn't—

Mr. Triester: The Government's public policy is so that it doesn't lead to bribery of Government persons or—as the Court states, the Government should not be put in a position as dealing with innumerable persons, and so on and so forth, and that rationality can be applied to the validity of this provision on behalf of Fruehauf and Com-Air.

In the Delta matter we have other factors, and also GMC, which is under submission, we have other factors, and so on.

The only point I want to make is to be sure Com-Air and Fruehauf concede—enforce the non-assignability provision—detriment by reason of an offset, and certainly Aetna can get no greater right as against Fruehauf [23] than Zipco had.

The Referee: We have had some cases where the money was paid to the assignee before bankruptcy, I have ruled that the trustee in bankruptcy did not have a right to recover, merely because the contract had a non-assignability clause, on the ground that it was enforced and carried out

and executed before bankruptcy and is not a preference.

Here we have a situation where Com-Air and Fruehauf have actually refused to pay the money and it still hasn't been paid.

Mr. Triester: I might say this also, the situation in O'Neill vs. O'Malley, the Veterans' Welfare Board was involved in that case, and refused to recognize the assignee until the Court had resolved the controversy.

I might say this, though, if the Court's holding on this point now is correct, then in every case where the money is paid within four months before bankruptcy the trustee should be allowed to institute plenary suit to recover the preference. Why? Because until payment the transfer isn't perfected, according to your holding.

If perfection takes place within a four months period, that is when the transfer is made.

The Referee: Let me give you another thought. As you know, I had this matter under submission for some months. This Court does not take matters under submission [24] very long.

One of the things that went through my mind in this matter—I am not sure that I read all of the cases you have cited in your supplemental brief, but I certainly read the ALR, but one of those things that bothered me in those cases that were cited was this: many of them held where there was an agreement to sell real estate or personal property, for that matter, and had a provision against assignment that was for the benefit of the

conditional vendor, and if there was an assignment by the conditional vendee it was a battle between the parties, that is between the conditional vendee and the assignee because it was subject to the contract. However, none of those cases did I consider comparable and parallel to our situation, because here it involved the matter of paying money by Com-Air and Fruehauf in this case, and in others where I have the same problem where the right of the Trustee intervened before the payment was made, wherein those other cases it was simply that they took it subject to the residual title remaining vested in the conditional vendor.

In other words, there wasn't any question that the conditional vendee had an equity in the real or personal property which he could pass on. That was part of the thinking that went through my mind. It may be sound or it may not, but I am indicating to you why many of those cases that were cited in the ALR and were cited by counsel [25] I did not consider applicable.

Mr. Triester: All we are talking about is money here. Assuming there are no offsets, and in some cases Witkin indicates if all it calls for is the payment of money, even the obligor can't insist upon enforceability.

The other distinction, and frankly—in the Portuguese Bank case Mr. Justice Holmes, opinion, although the U. S. Supreme Court law—

The Referee: You don't feel towards Justice Holmes as does Professor McLaughlan.

Mr. Triester: No, I certainly do not. If I did,

I would not say it, but he does make the holding in that case, and it was merely a claim against the estate. There was no land contract, there was money, just like an account receivable, and he holds as between assignor and assignee the non-assignability clause will be disregarded.

In that case, as I recall, the obligor was a Governmental agency, the Board of Public Works.

We say that the assignor can't prevail or insist upon the enforceability of these non-assignability clauses, therefore his Trustee in bankruptcy cannot, because there is no special statute applicable to this situation, giving the creditors of the assignor any greater right than the assignor had, and therefore, the general rule prevails that creditors who levy get only what the debtor had at the time of the levy. [26]

I would like to distinguish *Parkinson vs. Caldwell*. I don't wish to do it at great length, because Mr. Birnbaum or Mr. Hemmerling have analyzed the case very thoroughly, and I am completely in accord with their analysis.

Parkinson vs. Caldwell is a most remarkably complex fact situation, but upon analysis it is a suit between competing rights of the obligor and the assignee.

The Court will recall it was the nephew versus the pledgee of this note. The nephew is the one who, if that non-assignability clause is not enforced, will have to pay extra taxes on the nephew's estate, because he is the only one that has an interest in the estate, that of the aunt's which executed the

note in question, so the nephew is the obligor in effect, and his rights are exactly that of the maker of that note, and where he can show it would be a hardship on him not to enforce the non-assignability clause, we will concede that the obligor itself can enforce them, but that is why *Parkinson vs. Caldwell* is not in point. It is not a suit between assignor and assignee or the creditor's representatives of either of them nor contemplating interests between the obligor and assignee, and certainly this must be sound, otherwise the District Court of Appeals would have had to at least mention *Johnston vs. Landucci* and the other two decisions.

The Referee: In the *Parkinson vs. Caldwell*, I quoted my opinion beyond that which was necessary. They say, [27] finally, in other words, after the disposition of the case, appellants argue that to permit the uncle's estate to recover the proceeds of the note will result in its unjust enrichment, since the uncle received the money, the repayment of which was attempted to be secured by the pledge of this note. It was established in the trial court that the estate of the uncle was insolvent, and that the nephew has a claim against the uncle's estate of approximately \$10,000 for taxes which the uncle *paid* to pay on the trust estate during his lifetime.

I should underscore the word "finally," but remember, the Court reached its conclusion prior.

Mr. Triester: I read that word "finally," differently. They haven't disposed of the case, because to dispose of the case they must answer the unjust enrichment argument.

The Referee: I read Mr. Hemmerling's brief, and I merely interrupt to indicate that I was not unmindful of the Parkinson case, at least that phase of it.

Mr. Triester: We think Parkinson vs. Caldwell, it is hard to say, because the fact situation is so complicated and the language of the Court has to be read—it is the latest of the three leading cases upon the subject in point of time, it is the most recent in point of time, but it is not the highest court in the state which has passed upon the problem. [28]

The Referee: Except, I think, the District Court of Appeal which interpreted the prior decisions of the Supreme Court of the state probably does just as good a job of interpreting the Supreme Court as I can, and that is the reason I gave Parkinson vs. Caldwell considerable weight. I don't know that I would have reached the conclusion I did, had not the District Court of Appeal interpreted some of the prior decisions in the manner in which it did.

Mr. Triester: I think this Court is bound to determine what the California law is, and in so doing you must be guided by the applicable decisions, to the extent that cases, if you should find are inconsistent with each other, the State of California Supreme Court decision would govern.

The remarkable thing is in Parkinson vs. Caldwell, Mr. Hemmerling mentions in his brief, that these three cases were never relied on and were never even cited to the District Court of Appeal.

I don't see how they could have been in ignorance of them.

The Referee: That sometimes happens.

Mr. Triester: In any event, my analysis of the Parkinson case makes it consistent with the other three, but because it is a suit between obligor and assignee, once viewed that way I have no quarrel with it at all.

I would like to say in closing one thing. I would like [29] to call to the Court's attention what I think is a rather important point, because it may well be, although I don't think so, it may be that the Court will come to the conclusion that this is really an open question in the State of California. If that is so, if the Court does come to that conclusion, then I think it would be incumbent upon the Court to fashion the most desirable rule in filling this gap, if there is a gap. I don't think there is a gap, I think the California cases speak on the subject.

The Court will recall in Parkinson against Caldwell they relied very heavily on the Allhusen case which is a New York case. It is a case that is not consistent with what I have been arguing. It is a case where the rights of the obligor vs. the assignee were involved, therefore it is really not in point with Parkinson. Parkinson takes some of the language of Allhusen and relies very heavily on it. Allhusen is a New York Court of Appeals case, and it has been tremendously criticized on policy grounds.

If this is an open question in the State of Cali-

fornia, I think a decision that the Court will have to determine is which policy to adopt; a decision which eliminates a very desirable financing device, such as a non-notification of accounts receivable and factoring would be an unwise decision. [30]

I would like to read to the Court briefly from a recent article on the subject by Professor Gilmore, who is a professor at Yale University and a very close colleague of Professor Moore, and very acquainted with bankruptcy problems and economics.

In an article which is cited by Mr. Hemmerling from the Yale Law Journal he says this on pages 19 and 20:

“It is of greater interest that the Court of Appeals, in repelling the suggestions, was unable to cite a single New York precedent which had held that a non-assignment clause was a defense to an action by an assignee. It was forced to fall back uncomfortably on the dicta in cases which had held the reverse, noting that none of the earlier cases had involved ‘a contractual provision against assignments framed in the language of the clause now before us.’

“Furthermore, nothing in the Court’s opinion betrays awareness that the conditions of accounts receivable financing had changed in any way since the late 19th or early 20th Century, when the cases principally relied on had been decided.”

Here is Professor Gilmore’s statement, which is in a way almost as strong as Professor McLaughlan’s language.

“The case stands as a monument to the purest

[31] type of conceptualism, untainted by a breath of the work-a-day world."

I submit it is an open question in this state, and I think the Courts require——

The Referee: The question that bothered me was the question of unjust enrichment, and again I say I added this second paragraph, lest counsel think I overlooked that.

Then again I felt that a factor in this case and factors in all cases, talking of policy now, and answering the professor there, that the factors knew or certainly could have very easily known before taking an assignment and before disbursing the money, examine the purchase orders and see whether they were or were not assignable. If they were not assignable, they didn't have to buy the accounts receivable.

Of course, the assignor, that is the bankrupt also has a purchase order and it can be delivered to the assignee or the factor.

Mr. Triester: But assuming they can determine this, assuming there may be a problem, and assuming they can determine, they can't factor on a non-notification basis, they just can't lend on those accounts or buy those accounts without going to the obligor and notifying him about this, because they need his consent.

The Referee: They are not compelled to purchase those [32] accounts.

Mr. Triester: They may not have to, but wouldn't this be an unfortunate set of circumstances if all of the people in the area doing defense

work on subcontracts can no longer borrow on a non-notification basis? It would be a real blow to a very desirable type of financing.

The Referee: Perhaps. I don't know. Perhaps it will weed out the men from the boys and perhaps the reverse of your argument is equally true. It may eliminate hundreds of thousands of dollars of obligations which these undercapitalized companies incur and which result in non-payment and bankruptcy. You can argue it either way; I don't know.

Mr. Triester: I can make no independent economic judgment as to whether you should have large numbers of small firms or big giants, but I would say in my policy judgment only, as far as these businessmen are concerned, they want this type of financing device, so why shouldn't the law be their servant rather than their master in this type of situation?

The Referee: Except those remedial statutes which you advocate should be enacted by the Legislature. This legislation should not come in the form of a judicial interpretation or decision.

We have a similar situation under the Internal Revenue law, they do not recognize mechanic's liens, and [33] it is a very harsh law and has resulted in a great deal of hardship, and so on. It has been my comment in those cases that Congress enact remedial legislation because the statute is clearly to the contrary.

Mr. Triester: The holding now proposed is if we are making transactions good as between assignor and assignee, voidable or attackable by the creditors

of the assignor, even though there is no such special statute——

The Referee: I notice that it is now 12:20, and I think this matter should be continued until 2:00 o'clock this afternoon. [34]

[Endorsed]: Filed January 24, 1958.

[Endorsed]: No. 16042. United States Court of Appeals for the Ninth Circuit. Irving I. Bass, Trustee in Bankruptcy of the Estate of Zipco, Inc., a corporation, bankrupt, Appellant, vs. Aetna Factors Co., Fruehauf Trailer Co., and Com-Air Products, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 3, 1958.

Docketed: June 12, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16042

IRVING I. BASS, Trustee in Bankruptcy of
Zipco, Inc., a corporation, Bankrupt,
Appellant,

vs.

AETNA FACTORS COMPANY, Appellee.

ADOPTION OF STATEMENT OF POINTS
UPON WHICH APPELLANT INTENDS
TO RELY AND DESIGNATION OF REC-
ORD ON APPEAL

To the United States Court of Appeals:

Comes now Irving I. Bass, Trustee in Bankruptcy in the matter of Zipco, Inc., a California corporation, the appellant herein, by and through his counsel, Craig, Weller & Laugharn, William E. Bartley of counsel, and hereby adopts the Appellant's Statement of Points on Appeal dated April 30, 1958 and the Designation of Contents of Record on Appeal dated April 30, 1958, save and except Item No. 9 of the said Designation of Contents of Record on Appeal, which is deleted; Item No. 13 which is deleted; Item No. 21 which is deleted, and Item No. 22 which is deleted. The adopted Designation of Contents of Record on Appeal should specifically contain any and all exhibits attached to the original Petition for Arrangement under Chapter

XI of the Bankruptcy Act or attached to any of the other documents designated.

The above adopted Statement of Points on Appeal and Designation of Contents of Record on Appeal are hereby incorporated herein by reference as fully as if set forth in detail herein.

Dated: June 26th, 1958.

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 27, 1958. Paul P. O'Brien, Clerk.

Nos. 16042 and 16073

Consolidated cases

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUVING I. BAES, Trustee in Bankruptcy of the Estate of
ZIPCO, INC., a corporation, Bankrupt,

Appellant,

vs.

~~ALFA~~ FACTORS CO., FRUEHAUF TRAILER CO., and COM-
AIR PRODUCTS, INC.,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
ZIPCO, INC., a corporation, Bankrupt,

Appellant,

vs.

AETNA FACTORS CO., FRUEHAUF TRAILER CO., and COM-
AIR PRODUCTS, INC.,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The consolidated appeals were consolidated by a Stipulation dated October 22, 1958 and an Order of Consolidation dated November 4, 1958, the Stipulation and Order being set forth at pages 15 to 18 in the Transcript of the Record. The appeal in case No. 16042 is an appeal from an Order of the District Court, Southern District of California, Central Division, dated March 28, 1958 and entered on March 31, 1958, reversing on review Findings of Fact, Conclusions of Law and Order of a Referee in Bankruptcy. Case No. 16228 is an appeal from an Order of the District Court, Southern District of California, Central Division, made and entered on September 23, 1958, and affirming on review Findings of Fact, Conclusions of Law and Order of a Referee in Bankruptcy.

Jurisdiction of the District Court, in each case, existed under Section 2-a(7) of the Bankruptcy Act, United States Code, Title 11, Chapter 2, Section 11, and Jurisdiction of this United States Court of Appeals lies under Section 47(a) and (b) of Title 11, U. S. C. A.

Statement of Case.

These two consolidated appeals involve the identical facts, and the identical issues of law, and each arises out of the identical proceedings. Prior to bankruptcy, the bankrupt corporation received work orders or invoices from various persons or parties, including the Fruehauf Trailer Co. and Com-Air Products, Inc., for precision bushings, which the bankrupt manufactured. These work orders or invoices were accepted by the bankrupt corporation, and in each case contained a prohibition against the assignment of the right to perform the said contracts, and the right to receive payment thereunder. The precise language of these work orders or invoices will be hereinafter set forth in the argument section of this Brief. Subsequently, and in violation of the specific prohibition contained in the work orders and/or invoices, the bankrupt corporation assigned the accounts receivable arising by virtue of performance, to the Appellee, Aetna Factors Co. The Appellee had full knowledge of the prohibitions contained in the contracts, and served no notice upon the obligor companies, Fruehauf Trailer Co. and Com-Air Products, Inc. On the contrary, the Appellee had the bankrupt corporation from time to time collect the assigned accounts and then pay over to the Appellee the moneys so received.

At the time of bankruptcy each of the obligor corporations held funds in their hands, which the Trustee in Bankruptcy demanded of them. Fruehauf Trailer Co. paid

over to the Trustee the Funds in its hands, and Com-Air Products, Inc., held the funds in its hands subject to a determination by the Court concerning the legal ownership thereof. The Appellee made demand upon Fruehauf Trailer Co. and Com-Air Products, Inc., for payment, and in each instance the demands were refused and the said obligors refused to pay, basing their refusals upon the prohibition against assignments contained in their contracts with the bankrupt corporation. The Appellee then filed suit as against Aetna Factors Co. and Fruehauf Trailer Co. in the Superior Court of the State of California, in and for the County of Los Angeles, and the Trustee instituted these proceedings before the Referee.

At each of the hearings in the within matter, Com-Air Products, Inc., and Fruehauf Trailer Co., appeared and actively asserted their rights by and under their contracts, relating to the prohibition against assignment of accounts receivable, and while they appear as Appellees in case No. 16042, they are actually Appellants, as they oppose the payment of any moneys to Aetna Factors Co.

At the conclusion of the various proceedings before the Referee, the Referee made and entered Findings of Fact, Conclusions of Law and an Order to the effect that Aetna Factors Co. had no lien, claim or charge as against the moneys owed by Fruehauf Trailer Co. and Com-Air Products, Inc., and that the said funds should be paid over to the Trustee, finding as a matter of law and under California law, the prohibitions in the various contracts against assignments of the said contracts were valid and enforceable and that the Trustee in Bankruptcy had succeeded to the rights thereunder as a so-called "ideal creditor." The Appellee herein, Aetna Factors Co., filed a Petition for Review to the United States District Court, and the Honorable William C. Mathes, United States

District Court Judge, after argument, made and entered an Order reversing the Referee in Bankruptcy, and remanding the matter for further proceedings, and further Findings of Fact and Conclusions of Law in accordance with his Order remanding the proceedings. The first of these two appeals was taken from the Order reversing and remanding the matter to the Referee in Bankruptcy. A remanded hearing was held before the Referee, and in accordance with the Order of the District Court, the Referee in Bankruptcy made and entered Findings of Fact, Conclusions of Law and an Order reversing himself. The Trustee, the Appellant herein, then filed a Petition for Review to the United States District Court, and on a hearing Judge Mathes then affirmed the new Findings of Fact, Conclusions of Law and Order. This resulted in the second of these two consolidated appeals.

Specification of Errors Relied Upon.

I.

In connection with case No. 16042, the Court erred in each of the following particulars:

1. Erred in ordering that the Referee's Order of December 23, 1957, and the Findings of Fact and Conclusions of Law made in support thereof, be set aside;

2. Erred in paragraph II of the "Order on Review of the Referee's Order of December 23, 1957," in finding and ruling as a matter of law "inasmuch as the provisions in the subcontracts prohibiting assignments were solely for the benefit of the obligors, the assignments were valid under California law as against the bankrupt assignor and the factor assignee";

3. Erred in not affirming and adopting each and every of the Referee's Findings of Fact and Conclusions of Law of December 23, 1957;

4. Erred in not affirming the Referee's Order of December 23, 1957, and in not dismissing the Petition for Review;

5. Erred in recommitting the matter to the Referee with directions to hold a further hearing;

6. Erred in recommitting the matter to the Referee with directions to make Findings of Fact and Conclusions of Law as to whether or not any of the transactions involved were carried on with intent to hinder, delay or defraud creditors, etc., and in ordering the Referee to enter an appropriate Order or Orders based upon the said Findings of Fact and Conclusions of Law.

II.

Erred in the following particulars relating to Appeal No. 16228:

1. Erred in affirming the Referee's Order of August 25, 1958 in that

2. Conclusion of Law No. IV of the said Order of April 25, 1957 is contrary to law and fact;

3. Conclusion of Law No. V of said Order is contrary to law;

4. Conclusion of Law No. VI is contrary to law;

5. Conclusion of Law No. IX is contrary to law;

6. The Order based upon said Conclusion is contrary to law in paragraphs I, II and III as the same is supported by erroneous Conclusions of Law;

7. In not reversing the Referee's Order of April 25, 1958 and in not finding that as a matter of law the Conclusions of Law in the Referee's Order of December 23, 1957 were correct, and that an Order in conformity therewith should be made and entered.

Summary of Argument.

The Memorandum Opinion of Joseph J. Rifkind, dated May 10, 1957, and found at pages 15 to 22 of the Transcript of the Record, clearly and succinctly summarizes the Trustee's entire argument in this case, and the cases to be cited by the Appellant in the following argument. The Supplemental Memorandum Opinion of the Referee, dated October 15, 1957, and found at pages 24 to 34 of the Transcript of the Record, supplements the aforementioned Memorandum Opinion and is a learned dissertation on the law involved in this Appeal.

The Appellant will argue that there never was any question as to the facts in this case and the only question presented to the Court is purely and simply a question of law. This is demonstrated at page 75 of the Transcript in the paragraph containing bracketed [6]. At page 78 of the Transcript of the Record, Mr. Treister, the attorney for the Appellee, admits that even the Appellee agrees with the Court's decision on summary jurisdiction. At page 78, in the fifth full paragraph, Mr. Treister agrees with the Court that the validity of the prohibition against assignment in the Purchase Orders is a matter to be determined by State law, as stated in page 4 of the Court's Opinion. At page 81 of the Transcript of the Record, in the third full paragraph, Mr. Treister states: "We want to prevail on the real issue in controversy here, namely, whether or not a nonassignability clause in a Purchase Order is valid and enforceable when the Assignor goes into bankruptcy." At page 82 of the Transcript, in the first full paragraph, the Referee points out the difference in the clauses contained in the two contracts and that he commented on it in his Opinion. At page 15 of the Transcript, in the Referee's Memorandum Opinion, the Court

specifically points out and quotes first, the Purchase Order from Fruehauf Trailer Co. and secondly, the nonassignability clause in the Com-Air Products, Inc. No quarrel exists as between the Appellant and the Appellee as to these facts or any other facts as heretofore referred to in the Appellant's Statement of the Case.

The Appellant's whole argument will be that Judge Mathes erred in reversing the Referee and in requiring the Referee to hold as a matter of law (California State Law) the Appellee and Assignee who received an assignment contrary to specific provisions in a Purchase Order, could prevail as against the Trustee in Bankruptcy of the Assignor of the obligation. It will be argued that Section 70-c of the Bankruptcy Act and cases following the same, including *Constance v. Harvey* (C. C. A. 2d), 215 F. 2d 571, 575, Cert. den., 348 U. S. 913; *United States v. Eiland* (C. C. A. 4th), 223 F. 2d 118; *Sampsell v. Straub* (C. C. A. 9th), 194 F. 2d 228 at p. 231; and *England v. Sanderson* (C. C. A. 9th), 236 F. 2d 641 at p. 643, give to the trustee most extensive rights. It will be further argued that the case of *Parkinson v. Caldwell* (1954), 126 Cal. App. 2d 548, petition for hearing denied by the California Supreme Court and the *Allhusen v. Caristo Const. Co.* (N. Y.), 103 N. E. 2d 891, cited by the *Parkinson* case, control the California law in this matter. It will further be argued that these cases hold that the assignee cannot recover where an assignment of a chose in action or of personalty has been made in violation of specific language contained in the contract and that these cases stand for the proposition that a successor in interest of the assignor in this situation would prevail over the assignee.

ARGUMENT.

I.

There Is No Controversy as to the Facts in This Matter.

See the argument set out in the Summary of Argument and see the Transcript of the hearing on the Motion to Reconsider which is set forth at pages 70 to 100 of the Transcript of the Record wherein counsel for the Appellee at numerous places states that the only issue before the Court is a question of law as to the law of the State of California and how the same applies to the facts of this case.

II.

The Purchase Orders of Fruehauf Trailer Co. and of Com-Air Products, Inc. Clearly and Precisely Prohibited Any Assignment of Either the Right to Perform or the Right to Receive Benefits Under the Said Purchase Orders.

As set out in the Referee's Memorandum Opinion, commencing at the bottom of page 15 of the Transcript of the Record on Appeal, the Purchase Order from Fruehauf Trailer Co. to the Appellant's Bankrupt Corporation provides in paragraph V thereof:

“Assignment. The contract resulting from the acceptance of this Order, or any interest thereunder, shall not be assignable nor shall any part of the work be subcontracted by the Vendor without prior written consent of the purchaser.”

The Purchase Order from Com-Air Products, Inc., to the Appellant's Bankrupt, provides in paragraph 15 thereof

“Assignment and subcontracting. This Order may not be assigned or subcontracted in whole or in any part,

nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without the prior written consent of a buyer in each instance.”

This may be found on page 16 of the Transcript of Record.

The Com-Air Products, Inc., prohibition specifically by its language prohibits the assignment of any money due or to become due under the Purchase Order. The language in the Fruehauf Trailer Co. prohibition, “the contract resulting from the acceptance of this Order or any interest thereunder,” and specifically the words “or any interest thereunder” would be meaningless if they did not relate to the right to receive moneys as well as to the right to assign the contract. This is illustrated by the fact that the prohibition goes on to prohibit the assignment or the subcontracting of a work by the Vendor. It is submitted that the words “or any interest thereunder” would be meaningless unless they specifically related to money as the only method whereby a portion of a contract and specifically the performance of the contract, could be assigned, would be by subcontracting a portion of the performance of the contract and this is specifically forbidden by the latter portions of the prohibition.

III.

That California State Law and Section 70-c of the Bankruptcy Act Control, Is Clear.

At page 78, in the seventh paragraph of the Transcript of the Record, the attorney for the Appellee admits that as between the parties State law will govern and in the next paragraph above that, on the same page, again admits that the matter is to be determined by State law. On page 79 of the Transcript of the Record, in the third and

fourth full paragraphs on that page, Mr. Treister, the attorney for the Appellee, again admits that we must look to the State law and

“we are in agreement with the Court’s next holding, namely, that we agree that the Court correctly interprets the Trustee lien creditor status on the date of bankruptcy on page 5 of the Opinion.

“At this point I think this may be superfluous but I think this is the only provision under which the Trustee can prevail under Section 70-c of the Bankruptcy Act. . . .”

The cases of *Constance v. Harvey*, *United States v. Eiland*, *Sampsell v. Straub*, and *England v. Sanderson*, all illustrate that the Bankruptcy Act overrides the State law, and *Arnold v. Phillips* (5th Cir.), 117 F. 2d 497 at pp. 500-501, holds:

“ . . . Whether when bankruptcy supervenes a title acquired by one creditor is good as against other creditors, and what are the relative rights and standing of creditors as against each other, and what the propriety of recognizing and enforcing secured debts under varying circumstances, are questions so related to the bankruptcy power as to be regulable by Congress; they are of the essence of bankruptcy law. There necessarily arises also a body of judicial interpretation having the effect of law, which overrides the interpretation of the State courts on similar question. The ‘equity’ administered in the bankruptcy courts may not be exactly that of the State courts.”

IV.

The California State Law Is to the Effect That as Against an Assignee Who Has Received an Assignment of a Chose in Action, in Violation of Prohibitions in the Contract, a Successor of the Assignor May Recover, as Such an Assignment Is Void.

Counsel for the Appellant has exhaustively researched the case reports of the State of California and the most recent case they have been able to discover relating to assignments of choses in action contrary to an express prohibition contained in the contract giving rise to the right, is the case of *Parkinson v. Caldwell*, a 1954 District Court case, reported at 126 Cal. App. 2d 548, 272 P. 2d 934. This was an appeal from a judgment in favor of a plaintiff administrator of the Estate of T. W. Caldwell, in which the plaintiff was decreed to be entitled to the proceeds of a promissory note secured by a Deed of Trust. The facts of this case are somewhat complex and in essence were as follows: As a result of a Will contest, uncle and nephew entered into a compromise which in part provided that the uncle had a claim to be secured by a promissory note and a Deed of Trust in the amount of \$13,942.05. The compromise further provided "said note shall be payable to the party of the first part and shall be held by him until it shall become due according to its terms unless there be an agreement between the parties to the contrary. . . ." The note was executed to the uncle and on its face contained the above quoted language: A short time later the uncle executed a promissory note to other parties and as collateral security pledged the promissory note containing the above-cited prohibitory language; on the death of the uncle the nephew deposited the face amount of the note the uncle had been holding,

with a Title Insurance Company and asked the Title Insurance Company to reconvey the note to him; later and prior to the death of uncle, Viola Lester, the surviving joint tenant of the owners of the promissory note of the uncle, demanded that the Title Company pay her the \$12,000.00 represented by her note out of the moneys deposited by the nephew on the ground that she held the note and trust deed as security for the uncle's death; Plaintiff, the administrator of the uncle's estate, brought an action praying that he be decreed owner of the original promissory note and of the moneys deposited by the nephew with the Title Company; the trial court found for the plaintiff, that the purported pledge of the note to the uncle and deed of trust to the Lesters was of no force and effect as the same violated the prohibition against assignment contained in the original agreement and on the face of the note. In short, the plaintiff was the successor in interest of the uncle who had violated the language contained in the note and had, contrary to the provisions of the note, assigned the same by pledging it to secure a trust deed, and a successor in interest of the uncle was allowed to prevail over the one to whom the same was pledged.

At page 552 of *Parkinson v. Caldwell*, the court clearly holds:

“Where the language is clear an agreement not to assign a debt is effective. The precise question was elaborately discussed by the New York Court of Appeals in *Allhusen v. Caristo Const. Co.*, 303 N. Y. 446 (103 N. E. 2d 891), and at page 893 (103 N. E. 2d), the Court concluded ‘in the light of the foregoing, we think it is reasonably clear that, while the Courts have striven to uphold freedom of assignability, they have not failed to recognize the concept

of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited.' ”

At page 552 the California Court in the *Parkinson* case cites, with approval, 4 Corbin on Contracts, Section 572, page 486, as follows:

“In any case, it is quite possible for the parties to show by apt words that rights created by the contract shall not be assignable. It is obvious that they mean exactly this and nothing else in case the contract is unilateral from the beginning. . . . So if A lends money to B, receiving from B a note that expressly declares that it is not assignable, there is no doubt that they mean A's right to the money to be nonassignable.”

It is submitted that we have precisely the same situation existing in this case as is set forth in the above section of Corbin on Contracts and cited with approval by the California court in that each of the two Purchase Orders involved herein expressly declared that they were non-assignable.

In headnote 4 on pages 552 to 553 of the *Parkinson* case, the California court goes on to cite with approval Professor Williston's treatise on Contracts (Vol. 2, Sec. 422, p. 1214) which, among other things states:

“ . . . plaintiff's claimed rights arise out of the very contract embodying the provision now sought to be invalidated. The right to moneys under the contracts is but a companion to other jural relations forming an aggregation of actual and potential inter-related rights and obligations. No sound reason appears why an assignee should remain unaffected by a provision in the very contract which gave life to the claim he asserts.”

The Court then goes on to state at page 553 that the California courts are in accord and cites *La Rue v. Groeszinger*, 84 Cal. 281, and *Fairbanks v. Crump Irr. etc. Co., Inc.*, 108 Cal. App. 197 at p. 205, 291 Pac. 629, 292 Pac. 529.

At headnote 5 on page 553 of the *Parkinson* case, the Court answers an argument of unjust enrichment to the effect that more than the rights of the successor in interest to the assignor are involved, and cites California Civil Code, Section 3543 as applicable and embodying the following rules:

“Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.”

It is submitted that we have a very similar situation to the situation involved in the *Parkinson* case, in the instant proceeding. In the instant proceeding not only the rights of the assignor, Zipco, Inc., the bankrupt herein, and the rights of the Appellee, the assignee are involved, but also the rights of Fruehauf Trailer Co. and Com-Air Products, Inc., as well as the rights of all of the creditors of Zipco, Inc. which is now insolvent and bankrupt. It is clear that the Appellee accepted the assignment or assignments to it by Appellant's bankrupt, in direct violation of the language and prohibitions contained in the Purchase Orders. It is clear that the Appellee had but to read the contracts involved to ascertain that they specifically prohibited such assignments. It is also clear that the only moneys owing are owing by virtue of the Purchase Orders of the obligors, yet Aetna Factors Co., the Appellee, chose to claim under the very Purchase Orders yet to disregard the specific prohibitions contained therein. It is further submitted that this is exactly what

Parkinson v. Caldwell prohibits. It is further submitted that the creditors of the bankrupt corporation who are innocent third parties, including the taxing authorities, will be the persons who actually benefit if the Appellant prevails, rather than the Appellee benefiting by his own wrongful act and that in this situation the Appellant should prevail. In addition, it is clear from the record that a controversy exists between Fruehauf Trailer Co. and Com-Air Products, Inc., and the Appellee as to the amount owing, and that the obligors have refused to pay over to the Appellee the moneys involved and that under California State Law, if the Appellee should prevail in this proceeding, the obligors will merely refuse to pay the Appellee in this case and the net result will be that the Appellee will, in any event, not recover.

Conclusion.

The Memorandum Opinions of the Referee in Bankruptcy, *supra*, and the original Findings of Fact, Conclusions of Law and Order of the Referee, date December 23, 1957, and found at pages 35 to 43 of the Transcript of the Record, clearly followed the rule enunciated in *Parkinson v. Caldwell* and in *Allthusen v. Caristo Const. Co.*, *supra*, to the effect that a prohibition against assignments contained in a contract renders an assignment made contrary to the said provisions, void. It has been amply demonstrated above, that these Findings and the Order based thereon were in accordance with existing California law which controlled the issue before the Court. It necessarily follows that the Order of the District Court reversing this Order and directing the Referee to prepare new Findings of Fact, Conclusions of Law and Order was erroneous and should be reversed on appeal. From this it follows that the subsequent Findings

of Fact, Conclusions of Law and Order of the Referee reversing himself, as directed by the District Court, are likewise erroneous and should be reversed on appeal.

For the reasons set forth above, it is respectfully urged that the Orders of the District Court appealed from in this consolidated appeal be reversed, and the original Findings of Fact, Conclusions of Law and Order of the Referee be affirmed.

Dated: February 12, 1959.

Respectfully submitted,

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Nos. 16042 and 16228

Consolidated Cases

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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vs.

AETNA FACTORS Co., FRUEHAUF TRAILER Co., and
COM-AIR PRODUCTS, Inc.,

Appellees.

BRIEF OF APPELLEE AETNA FACTORS CO.

FILE

MAR 9 1959

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BRIEF OF APPELLEE AETNA FACTORS CO.

Statement of Facts and the Case.

These are consolidated appeals from two orders of the Honorable William C. Mathes, United States District Judge, dated respectively March 28, 1958 [Tr. Case No. 16042, pp. 50-52]¹ and September 23, 1958 [Tr. Case No. 16228, pp. 9-10], which held that Aetna Factors Co. (hereinafter referred to as Appellee) had superior rights to certain accounts receivable as against Appellant-Trustee in Bankruptcy. The accounts arose as a result of work performed by the bankrupt for Fruehauf Trailer Company (hereinafter referred to as Fruehauf) and Com-Air Products, Inc. (hereinafter referred to as Com-Air).

¹All citations to the record refer to the printed Transcripts of Record on file in the Court of Appeals.

Prior to bankruptcy, the bankrupt sold and factored to Appellee for valuable consideration its Fruehauf and Com-Air accounts receivable. Notice of the intended assignments was duly filed in accordance with Sections 3017 *et seq.* of the California Civil Code. [Tr. Case No. 16042, pp. 55-56.]

The purchase orders giving rise to the Fruehauf accounts contained the following prohibition of assignment: "The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any part of the work be sub-contracted by the vendor without prior written consent of the purchaser." [Tr. Case No. 16042, p. 56.] The Com-Air contract provided against assignment as follows: "This Order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance." [Tr. Case No. 16042, pp. 56-57.]

When bankruptcy occurred, Fruehauf and Com-Air, relying upon these provisions against assignment, refused to pay Appellee on the accounts theretofore factored by the bankrupt. [Tr. Case No. 16042, p. 57.] The Referee at first held that the transfer in violation of the non-assignability clauses rendered the assignments void, thereby enabling a subsequent attaching creditor of the bankrupt—and accordingly a Trustee in Bankruptcy under Section 70c of the Bankruptcy Act—to obtain rights in the accounts superior to Appellee's title. [Referee's Order of December 23, 1957; Tr. Case No. 16042, pp. 35-43.]

On Appellee's Petition for Review, District Judge Mathes reversed, but remanded the matter for further findings and conclusions as to whether there had been a

fraudulent transfer and whether Appellee and the bankrupt had been engaged in a joint venture. [Order of March 28, 1958: Tr. Case No. 16042, pp. 50-52.] The protective appeal from this order, which constitutes case No. 16042, should be dismissed inasmuch as it involves an attempt to review an interlocutory order made in a "controversy arising in a proceeding in bankruptcy." Bankruptcy Act Sec. 24a, 11 U. S. C. Sec. 47a.

Upon remand, the Referee found and concluded that no fraud existed in the sale of the accounts to Appellee, and that there had not been a joint venture or similar relationship between the bankrupt and Appellee in the factoring transactions. [Tr. Case No. 16042, p. 61.] Accordingly, he followed Judge Mathes' order of March 28, 1958, and ruled that the accounts in question belonged to Appellee. [Referee's Order of April 25, 1958: Tr. Case No. 16042, pp. 53-62.]

This holding was affirmed by Judge Mathes in his Order of September 23, 1958. [Tr. Case No. 16228, pp. 9-10.] The appeal from this latter final decision constitutes case No. 16228 and as to it, appellate jurisdiction exists. Bankruptcy Act Sec. 24a, 11 U. S. C. Sec. 47a.

Statute Involved.

Bankruptcy Act, Section 70c, 11 U. S. C., Sec. 110c:

"The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Issues Presented.

1. Where an account receivable is assigned in violation of a contractual prohibition against assignment, does the transfer nevertheless pass the assignor's rights to the assignee?

2. Is the provision against assignment contained in the Fruehauf contract sufficient to prohibit an assignment of monies coming due thereunder, even as between obligor and assignee?

Outline of Appellee's Argument.

A. Appellee is Entitled to the Fruehauf and Com-Air Accounts Receivable as Against Appellant-Trustee in Bankruptcy.

1. *Under Section 70c of the Bankruptcy Act, the Trustee in Bankruptcy gets only such rights to the accounts as an attaching creditor of the bankrupt might have been able to obtain under California law on the date of bankruptcy.*

2. *Under California law, a creditor of the bankrupt who, on the date of bankruptcy, garnished or levied an attachment on the Fruehauf and Com-Air accounts, would have obtained no greater rights thereto than the bankrupt itself had.*

3. *Regardless of the enforceability of the non-assignment provisions by the obligors, the assignments of the Fruehauf and Com-Air accounts were valid as between the assignor and assignee. Thus, as between the two, the assignments divested the bankrupt of all its rights in the accounts prior to bankruptcy, and transferred same to Appellee.*

B. The Provision Against Assignment of the Fruehauf Account is Not Sufficient in Form to Prevent an Assignment of Monies Becoming Due Under the Contract.

ARGUMENT.

A. Appellee Is Entitled to the Fruehauf and Com-Air Accounts Receivable as Against Appellant-Trustee in Bankruptcy.

1. Under Section 70c of the Bankruptcy Act, the Trustee in Bankruptcy Gets Only Such Rights to the Accounts as an Attaching Creditor of the Bankrupt Might Have Been Able to Obtain on the Date of Bankruptcy.

Brief quotations from the two leading treatises on the law of bankruptcy should suffice to establish this proposition, since Appellant hardly seems to deny it.

In 3 Remington on Bankruptcy, pages 554-555, the author states:

"The rights conferred on the trustee by the last sentence of §70(c) of the Act are not dependent upon rights held by any existing creditor, but are those of an 'ideal' creditor. He can rely on any of the rights or powers of such a creditor under applicable state law, notwithstanding no existing creditor had them at date of bankruptcy and diligent use of the imagination and close figuring are required to work out even a mythical creditor who would have had such rights. *But if the trustee is unable, even with such assistance from the Bankruptcy Act, to make out a situation under which a creditor governed by such law could hold the transaction for naught, the possibilities under §70(c) are exhausted.* That provision does not go so far as to make the trustee a bona fide purchaser." (Emphasis added.)

4 Collier on Bankruptcy, pages 1263-1265, puts the same proposition in this manner:

"Therefore, the trustee's powers, in every case governed by this portion of §70c, are those which the state law would allow to a supposed creditor of the

bankrupt who had, at the date of bankruptcy, completed the legal (or equitable) processes for perfection of a lien upon all of the property in either the bankrupt's or the court's possession or control . . . *But the extent of the trustee's rights, remedies, and powers as a lien creditor are measured by the substantive law of the jurisdiction governing the property in question.* It is not for the state law to determine what rights conferred on lien creditors are transferred to the trustee under the Act. *Nor, on the other hand, does §70c confer on the trustee any greater rights than those accorded by the applicable law to a creditor holding a lien by legal or equitable proceedings.* These are fundamental concepts in the application of the strong-arm clause of §70c which must not be forgotten." (Emphasis added.)

Despite the foregoing, Appellant perhaps implies that a Trustee in Bankruptcy obtains greater powers under Section 70c than are conferred upon creditors by applicable state law. (Op. Br. pp. 10, 7.) None of the cases cited, however, nor any others would sustain such a proposition.² As plainly demonstrated above, to prevail under Section 70c the Trustee must show that a creditor of the bankrupt—albeit a hypothetical one—could have successfully attacked the transfer in question under the state

²The cases cited by Appellant, perhaps for the proposition that Section 70c gives the Trustee more powers than a hypothetical creditor would possess under state law, do not so hold. (Op. Br. pp. 10, 7.) In *Sampsell v. Straub*, 194 F. 2d 228 (C. A. 9, 1951), and *England v. Sanderson*, 236 F. 2d 641 (C. A. 9, 1956), the Trustee prevailed over the bankrupt's claim to a homestead exemption because a hypothetical judgment lien creditor could have obtained rights in the homestead superior to those of the bankrupt at the time of bankruptcy. In *Constance v. Harvey*, 215 F. 2d 571 (C. A. 2, 1954), the Trustee was permitted to invalidate a tardily recorded chattel mortgage for the reason that a hypothetical creditor who had extended credit before the recordation could have prevailed

law on the day of bankruptcy. The authorities referred to by Appellant do not contain the slightest implication to the contrary.

2. Under California Law, a Creditor of the Bankrupt Who, on the Date of Bankruptcy, Garnished or Levied an Attachment on the Fruehauf and Com-Air Accounts, Would Have Obtained No Greater Rights Thereto Than the Bankrupt Itself Had.

It is almost axiomatic in California that, absent some special statute conferring greater rights, a creditor who levies on property "stands in the shoes of the debtor," the lien attaching only to the debtor's interest at the time of levy. As the California Supreme Court in *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal. 2d 256, 259-260 (1941), stated:

"It is the general rule that an attaching creditor, seeking to subject the property of a debtor to the payment of his debt, obtains a lien only upon the title or interest which the debtor has in the particular property at the time of the levy. Thus, if all the title and interest of the debtor has been assigned to a third person, the attaching creditor gets nothing by virtue of his levy."

over the mortgagee on the date of bankruptcy. Appellant's citation of *United States v. Eiland*, 223 F. 2d 118 (C. A. 4, 1955), is even more puzzling, inasmuch as Section 70c was not there involved at all. The question was whether the Director of Internal Revenue had sufficient "possession" under his levy on certain accounts receivable to enable him to avoid postponement of his tax lien under Section 67c(1) of the Bankruptcy Act. And the Court held the Government's rights to be superior to the Trustee. Likewise, *Arnold v. Phillips*, 117 F. 2d 497 (C. A. 5, 1941), did not involve Section 70c: rather, it was concerned with the Bankruptcy Court's power to subordinate claims of corporate insiders to those of other creditors, where equitable considerations so required.

Haupt v. Charlie's Kosher Market, 17 Cal. 2d 843 (1941), involved competition between the lien of an attaching creditor upon a tort judgment and the equitable lien upon the judgment in favor of the debtor's attorney arising out of his contingent fee agreement. The decision is directly in point since the tort cause of action was non-assignable under California law at the time the attorney's lien was created by the contract. The Court ruled that the attaching creditor's rights were junior to the equity in favor of the attorney:

"In such a case it has been held that the agreement for a lien is decisive as to its existence and amount, and it constitutes a valid equitable assignment of the judgment *pro tanto*, and created a lien upon the specific fund notwithstanding that the action in which the judgment was obtained was on a cause of action for tort in itself unassignable . . .

"It is settled that an attachment lien reaches only the interest of the debtor in the attached property and is therefore subject to prior equities against the debtor." (17 Cal. 2d at 845-846.)

In 6 Cal. Jur. 2d, Attachment and Garnishment, Sec. 130, the law is summarized as follows:

"An attaching creditor obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy and where no actual interest is shown he gets nothing by virtue of his levy. The lien attaches to the real and not the apparent interest of the debtor . . .

"The attachment lien is subject to prior equities against the debtor, so that the claim of an attaching creditor may be defeated by proof of an equitable assignment of the debtor's interest, or by a prior unrecorded conveyance of the debtor's real property.

An attaching creditor does not have the status of a bona fide purchaser for value, and the fact that he has no knowledge at the time the attachment is levied that corporate stock attached has been theretofore pledged does not make the attachment lien prior in time or right to the lien of the pledgee; and when attaching property subject to a mortgage, whether recorded or not, he takes only the interest the mortgagor had at the time of the levy.

“Where a statute declares a previous transfer of title void as to creditors of the transferor, there is an exception to the general rule as to the inefficacy of an attachment to reach an interest of which the debtor has divested himself. The exception is founded on the theory that, as to the creditor, there is no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all others.”

A large number of additional authorities to the same effect are collected in McKinney, New California Digest, Attachment, Sec. 58.

See also:

- 1 Witkin, California Procedure, p. 913;
- 3 Witkin, California Procedure, p. 2006;
- Code Civ. Proc., Secs. 698, 699.

As noted above, there are some instances where, by virtue of a special statute, an attaching creditor in California can obtain greater rights to certain property than the debtor himself had. Thus, for example, even though a given transfer or encumbrance is valid as between a debtor and his transferee, a subsequent attaching creditor will normally prevail in cases of an unrecorded or belatedly recorded chattel mortgage (Civ. Code, Sec. 2957); where

there has been a failure to comply with the requirements of the Bulk Sales Law (Civ. Code, Sec. 3440.1); where personal property has been transferred without immediate delivery and actual change of possession (Civ. Code, Sec. 3440); where accounts receivable have been assigned without filing of the requisite notice (Civ. Code, Sec. 3018); where a fraudulent transfer has been made (Civ. Code, Sec. 3439.09); and in cases of certain defective trust receipt transactions. (Civ. Code, Sec. 3016.4.)

But there is no such special statute conferring additional rights on creditors which is applicable in the present case. As was expressly found, Appellee did properly comply with the statutory requirements concerning the filing of the notice of assignment of accounts receivable. [Tr. Case No. 16042, p. 56.] Therefore, the general rule that an attaching creditor gets no greater rights than his debtor had is here controlling.

3. Regardless of the Enforceability of the Non-assignment Provisions by the Obligors, the Assignments of the Fruehauf and Com-Air Accounts Were Valid as Between the Assignor and Assignee.

Thus, prior to bankruptcy, the assignments transferred all the bankrupt's rights in the accounts to Appellee, and left no interest in the bankrupt which could be reached by an attaching creditor on the date of bankruptcy. On this date, Appellee at the very least had the equitable rights to the accounts as against the bankrupt, even if it be conceded for present purposes that Fruehauf and Com-Air could insist upon making payment directly to the bankrupt rather than to its assignee.

The Referee at first held that a transfer made in violation of a contractual provision against assignment was not only invalid as against the obligor, but also was void

as between the assignor and assignee. In reversing, the District Judge recognized that the California Supreme Court has declared the applicable state law to be the contrary. [Tr. Case No. 16042, pp. 50-51.] The leading case is *Johnston v. Landucci*, 21 Cal. 2d 63 (1942), involving the assignment of certain contract rights. At page 67, the Court framed one of the questions for decision as follows:

“Does a provision prohibiting assignment without consent of the seller . . . prevent the interest of the buyer-assignor passing to an assignee, where such consent is not secured?”

The Court held that the assignor's interest did pass to the assignee even though transferred in violation of the stipulation against assignment. At pages 67-68 it was stated:

“Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment . . . are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: ‘A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition.’

“The rule that such provisions are for the benefit of the seller and in no way affect the validity of an

assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court, (*Portuguese-American Bank v. Welles*, 242 U. S. 7 [37 S. Ct. 3, 61 L. Ed. 116]), and is the rule approved by Williston in his work on Contracts (*Williston on Contracts*, Revised ed., vol. II, §422). Although there are no cases in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee."

The *Portuguese-American Bank* case, *supra*, relied upon by the Court in *Johnston v. Landucci*, arose in California and involved an interpretation of the law of this state. The contract in question contained a provision against assignment of any rights or monies due thereunder except upon the consent of the California Board of Public Works. Without such consent, a bankrupt assigned as security to the bank certain funds due under the contract. Mr. Justice Holmes, writing for the Court, held that the transfer in violation of the non-assignability clause was good at least as between assignor and assignee, and that the bank was entitled to the funds as against a creditor of the bankrupt who attempted to assert mechanic lien rights to the funds after the assignment.

In *Williston on Contracts*, Vol. II, Sec. 422, page 1218 (Rev. Ed., 1936), cited by the California Supreme Court in *Johnston v. Landucci*, it is said:

"A prohibition of assignment or a condition restricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the legal or equitable

rights of the assignor and assignee as between themselves. Accordingly, if the assignor should collect the assigned claim he would be bound to pay what he had collected to the assignee.’’

More recently, in 1946, the District Court of Appeal followed *Johnston v. Landucci* in the case of *O'Neill v. O'Malley*, 75 Cal. App. 2d 821. The *O'Neill* case involved the following fact situation: A Husband purchased land from the California Veterans' Welfare Board on a title retaining contract providing against assignment without the Board's consent. With the Board's consent, Husband assigned the contract to Wife as her separate property. Thereafter, without the Board's consent, Wife assigned the contract to herself and Husband as joint tenants. Wife died, and the question was whether the rights under the contract belonged to the Wife's estate—on the ground that the reassignment without the Board's consent was invalid—or to the Husband as the surviving joint tenant. The Board refused to recognize the reassignment pending a court resolution of the controversy.

The Court held that the reassignment was valid as between the assignor (Wife) and assignee (Husband-Wife) despite lack of the Board's consent, and that the Husband accordingly was entitled to a decree quieting his title as against the Wife's estate. The rationale of the decision was as follows:

“This brings us to the question as to whether this assignment was invalid because the consent of the board was not secured. Had the original contract of purchase been between private parties and contained the identical provision above quoted against assignment without consent of the seller, there can be no doubt at all that an assignment by the vendee

without consent of the vendor would as between the parties and those claiming under them be valid. This exact problem has recently been reviewed by the Supreme Court in *Johnston v. Landucci*, 21 Cal. 2d 63.

. . .
“It is quite clear, if the same rule applies between the state and an individual as applies between individuals, that, under the rule of the Landucci case the assignment here between the husband and wife creating the joint tenancy was valid between the parties even though the consent of the board was not secured.

. . .
“There can be no doubt at all that under these sections there is a limitation against assignment written into every board contract by operation of law even if not expressed. But it is quite clear that if private individuals incorporated into their contract the exact language of the two statutes under the Landucci case, such language would be interpreted to be for the sole benefit of the vendor and would in no way affect the validity of the assignment between the assignor and assignee. It would seem that the language when used in a statute should not be given a different meaning. What appellants have overlooked is that there is a strong public policy in favor of the free transferability of property, and that such provisions have quite uniformly been interpreted as being for the sole benefit of the vendor and do not affect the rights *inter se* of the assignor and assignee.” (75 Cal. App. 2d at 824-827.)

Three years later, in *Rosenthal v. Landau*, 90 Cal. App. 2d 310 (1949), the District Court of Appeal again followed *Johnston v. Landucci* on substantially the same facts as were involved in the *O'Neill* case.

See also opinion of the Attorney General of California, No. 55-10, Feb. 4, 1955, 25 Ops. Cal. Atty. Gen. 101 at 102.

The foregoing California authorities are in accord with the precedents from other jurisdictions. In 148 A. L. R. 1361, 1362, the editors state:

“As to the general effect of a prohibition against assignment in a land contract or lease without the consent or approbation of the vendor or lessor, it has been generally stated that such a provision is for the benefit of the vendor or lessor, that only he, or those claiming through him, can take advantage of such a provision, and that if he does not choose to do so, no one else can.” (Citing many cases from a number of jurisdictions.)

In rejecting the foregoing authorities, the Referee cited *Parkinson v. Caldwell*, 126 Cal. App. 2d 548 (1954), the only California case now seriously relied upon by Appellant. But that decision, arising out of a rather complicated and usual fact situation, would appear distinguishable.

In *Parkinson*, an Uncle was trustee of a testamentary trust in which he had the income for life with remainder to his Nephew. To settle a will contest, Uncle and Nephew agreed that as trustee, Uncle would execute a note for approximately \$14,000.00 to himself as an individual, secured by trust deed on certain trust property. The agreement further provided against Uncle's transferring the note without Nephew's consent. In violation of this provision, Uncle pledged the note and trust deed to secure an obligation which he personally owed to Lester.

Upon Uncle's death, Nephew, as remainderman, posted with the trustee under the trust deed the amount owing by the trust on the note, so as to clear the lien of the en-

cumbrance from the trust property to which Nephew was now entitled. The suit was then brought by Uncle's administrator to determine the rights to the money put up by Nephew.

Lester claimed the money as owner of the note, being Uncle's transferee. Uncle's administrator (Plaintiff) contended that the fund should be paid to him because the pledge by Uncle to Lester in violation of the non-transfer provision was ineffective. Nephew joined in this contention, praying that the money be paid to Uncle's administrator so that it could be used to pay the obligations of Uncle's estate. Uncle, who had died insolvent, had failed as life tenant to pay some \$10,000.00 of taxes upon the trust; as a result, his estate was liable to Nephew as remainderman for this amount.

The court enforced the non-assignability provision, holding for the Plaintiff and the Nephew. Although, as between Plaintiff (Uncle's administrator) and Lester, the case would appear to involve the enforceability of the clause as between assignor and assignee, actually, as seen above, the dispute was one between Lester and the Nephew as sole remaining interested party in the trust; that is to say, the real question was whether a provision against assignment could be enforced against the assignee by Nephew who, as remainderman, was in effect in the position of the obligor on the trust's notes.

That this was the basis for the court's holding appears from its discussion of the unjust enrichment argument, 126 Cal. App. 2d at 553-554. The Nephew was held to be the one for whose benefit the non-transfer provision was

made, the purpose being to insure that the trust paid its note to the Uncle or his estate so that funds would exist to discharge any obligations which Uncle, as life tenant, might have incurred to Nephew, as remainderman. Especially important in this connection is the court's suggestion at page 553 that if Nephew were not involved in the suit, and the dispute were solely one between the assignor (Uncle or his estate) and assignee (appellant Lester), enforcement of the non-assignment clause might result in an unjust enrichment requiring a different holding.

As thus viewed, *Parkinson* is not inconsistent with the other authorities cited above. The decision heavily relied upon by the court in *Parkinson v. Caldwell*, and now urged by Appellant, was that of the New York Court of Appeals in *Allhusen v. Caristo Construction Co.*, 303 N. Y. 46, 103 N. E. 2d 891. The *Allhusen* case held that the obligor of a contractual debt could enforce the non-assignability provision in a suit against him by the assignee (or one claiming through the assignee). The enforceability of the clause as between assignor and assignee was neither involved nor decided. Similarly, Appellant's Brief quotes the treatise writers out of context (Op. Br. p. 13), for the quotations refer to the enforceability of the prohibitory clause as between obligor and assignee, not as between assignor and assignee.

For the purpose of the present argument, it may be conceded that Fruehauf and Com-Air, the obligors of the accounts receivable, can enforce the non-assignability clauses as against Appellee, the assignee. All that need be established here, however, is that as the Supreme Court

has held, the assignments were valid as between the bankrupt-assignor and Appellee, its assignee; or, in other words, that if the obligors insisted upon paying the accounts directly to the bankrupt, Appellee has the rights as against the bankrupt to the monies thus paid.³

Unlike *Parkinson*, enforcement of the stipulation against assignment in the present case would result in an unjust enrichment to the bankrupt or its estate. Appellee, prior to bankruptcy, purchased from and paid the bankrupt for the Fruehauf and Com-Air accounts. A holding which would permit the Trustee, the bankrupt's successor in interest, to collect again from the obligors and keep the monies would, as against Appellee, result in an unjust enrichment of the most obvious sort.

Assuming that the foregoing analysis of *Parkinson v. Caldwell* is incorrect, that the case, as the Referee at first concluded and Appellant now urges, is inconsistent with the authorities here relied upon by Appellee, nevertheless the District Judge correctly held that such an opinion of the District Court of Appeal could not overrule the Supreme Court's previous decision in *Johnston v. Landucci, supra*.⁴ *Parkinson* cannot be controlling on the question of the validity of an assignment *as between assignor and assignee*, or their successors in interest, so long as *Johnston v.*

³Whether the obligors will insist on paying the Trustee rather than Appellee is now academic in this case, since the monies have actually been paid in part to Appellant and in part to Appellee, with the understanding that an adjustment shall be made as between these parties in accordance with the final decision of this Court.

⁴The Referee would have followed *Johnston v. Landucci* and ruled for Appellee, but for the *Parkinson* case. [See Referee's Supplemental Memorandum, Tr. case no. 16042, p. 28.] Oddly enough, however, he believed that the most recent California case should control, even though it was an opinion of a court lower than the one which had rendered the earlier decision.

Landucci remains the law. There can be no distinguishing the two cases on the ground that the former involved a chose in action while the latter did not. The note and trust deed in *Parkinson* are hardly more of a "chose in action" than was the land purchase contract in *Landucci*. Certainly, the Supreme Court considered the land purchase contract a "chose in action" for the purpose of the *Landucci* decision. (See 21 Cal. 2d at 68.) And *Portuguese-American Bank v. Welles*, 242 U. S. 7, followed by the California Supreme Court in *Landucci*, involved an account receivable just as the present case does.

It should be noted, finally, that the District Court of Appeal in *Parkinson* did not in any way cite or refer to the Supreme Court's *Landucci* decision, nor to *O'Neill v. O'Malley* and *Rosenthal v. Landau*, *supra*, decisions of a coordinate California appellate court holding valid as between assignor and assignee an assignment in violation of a prohibitory clause. These authorities were not cited in the briefs filed in *Parkinson* and apparently were not otherwise called to the court's attention. For this reason, if for no other, it should not be inferred that the *Parkinson* case undermines the validity of the earlier decisions.

Appellee's position, above set forth in this section of its brief, can be tested in another way. To prevail, as seen above, Appellant must and does contend that the assignments in question were void even as between assignor and assignee. But if this were true, the bankrupt would have still owned the Fruehauf and Com-Air accounts at the time of bankruptcy. Accordingly, Appellant-Trustee would have obtained title thereto under Sections 70a(5) and 70a(6) of the Bankruptcy Act, 11 U. S. C., Secs. 110a(5) and 110a(6), and would have had no need to rely on a lien creditor's rights under Section 70c. Significantly, however, Appellant has never asserted the

bankrupt's "title" to the accounts, as distinguished from his attempt to reach them under a Trustee's Section 70c avoiding power. Any bald assertion of title would have exposed more quickly the fallacy of Appellant's argument.

B. The Provision Against Assignment of the Fruehauf Account Is Not Sufficient in Form to Prevent an Assignment of Monies Coming Due Under the Contract.

The Fruehauf contract, unlike Com-Air's, provided generally against assignment but did not prohibit in express terms the assignment of monies due or to become due thereunder. [See Tr. Case No. 16042, p. 56.] Because of California's general public policy in favor of free transferability of all kinds of property, Civil Code, Section 1044, the courts have strictly construed stipulations against assignment. Thus, even as between obligor and assignee, it has been held that such provisions do not prevent an assignment of monies owing under a contract, though the contract itself be non-assignable. In *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 339-340 (1947), the Supreme Court said:

"It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract (*Butler v. San Francisco Gas etc. Co.*, 168 Cal. 32, 41 [141 P. 818]; *Taylor v. Black Diamond Coal Co.*, 86 Cal. 589, 590 [25 P. 51]; *Dixon-Reo Co. v. Horton Motor Co.*, 49 N. D. 304 [191 N. W. 780]; see 76 A. L. R. 1307; 2 Williston, Contracts, rev. ed., §422), or of money damages for the breach of the contract."

And at page 344:

“ ‘Where a bilateral contract in terms forbids assignment, it becomes a matter of interpretation as to what is meant. Is it intended that a duty under the contract shall not be delegated, or is it intended that a right shall not be assigned, or are both prohibitions intended? (2 Williston, Contracts, rev. ed., 1217). Even if it is assumed that the prohibition against assignments relates to rights rather than duties, it does not necessarily apply to all claims under the contract or to all transfers of the contract rights. It is established that in the absence of language to the contrary in the contract, a provision against assignment does not govern claims for money due or claims for money damages for non-performance. . . . ’ ”

Similarly, in *Butler v. San Francisco Gas etc. Co.*, 168 Cal. 32, 41 (1914), the Court stated:

“The mere assignment of moneys due or to become due, although the contract may not be assigned, is held not to be an assignment of the contract.”

5 Cal. Jur. 2d, Assignments, Sec. 13, pages 286-287, summarizes the law in this respect as follows:

“As a broad general rule, the right to receive money due or to become due under a contract may be assigned, though the contract itself is by its terms declared to be non-assignable, or is non-assignable because it involves personal skill or confidence.”

It is submitted, therefore, that Appellee is entitled in any event to the monies owing on the Fruehauf accounts receivable.

Conclusion.

Wherefore, Appellee prays:

1. That the Order of the District Judge, dated September 23, 1958, appealed from in case No. 16228, be affirmed.

2. That the appeal from the Order of the District Judge, dated March 28, 1958, constituting case No. 16042, be dismissed, for the reason that the said Order is merely an interlocutory one in a "controversy arising in a proceeding in bankruptcy."

3. That Appellee recover of Appellant its costs on these appeals.

Respectfully submitted,

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See Vol. 3076

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No. 16,053

**United States Court of Appeals
For the Ninth Circuit**

JEAN DOBLER,

VS.

OLETA STORY,

Appellant,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

Honorable O. D. Hamlin, Judge.

APPELLANT'S REPLY BRIEF.

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FILED

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United States Court of Appeals
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Appeal from the United States District Court for the
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Honorable O. D. Hamlin, Judge.

APPELLANT'S REPLY BRIEF.

APPELLEE HAS GIVEN NO LAWFUL EXCUSE FOR HER NON-COMPLIANCE WITH THE PROVISIONS OF THE CALIFORNIA CIVIL CODE RELATING TO RESCISSION.

As pointed out in appellant's opening brief (App. Op. Br., pp. 13-14), California Civil Code §1691 (erroneously referred to as C.C.P. §1691, App.Op.Br., p. 13) states the manner in which a contract may be avoided if there is mistake present. Of course, the first requirement is notice. This requirement does not place an onerous burden on the person seeking rescission. It does not require any financial outlay on the part of the person giving it. Yet, even this simple step was not taken by appellee. Nowhere in appellee's reply brief does she offer any excuse or any

theory which would excuse or relieve her from this basic requirement of rescission.

Appellee attempts to rationalize in her reply brief that she did not have to make a tender of the consideration received, as required by California Civil Code §1691, in order to rescind the contract because appellant would not have accepted it. This, of course, is sheer speculation and guessing on appellee's part. There is nothing upon which she can logically base this gross assumption, except perhaps her imagination.

Appellee cites the case of *Carruth v. Fritch* (1950), 36 C.2d 426, 224 P.2d 702 in support of her proposition that no tender of consideration was needed. A reading of that case will reveal that the factual situation was entirely different. The trial court had sustained a demurrer with leave to amend but plaintiff failed to amend and the suit was dismissed. The judgment of dismissal was appealed. The plaintiff alleged that there was fraud by the defendants securing the release; that defendants knew the consideration which was paid for the release would immediately be used for medical expenses; that defendants were seeking to place her in a position where she could not tender the money advanced in the course of their fraud and relied on such facts and their fraud to prevent plaintiff from rescinding. There is no parallel between the *Carruth* case and the case at bar. Even in view of the strong allegations of fraud, there was a strong dissent in the case by Justices Schauer, Shenk and Spence urging that the judgment of dis-

missal be affirmed on the basis that it was incumbent upon plaintiff to restore the consideration she received for the contract before she could avoid it.

In the case of *Jordan v. Guerra* (1943), 23 C.2d 469, 476 cited by appellee (Appellee's Rep. Br. p. 18), there was strong evidence of fraud. In that case the court held that in view of the fraud and overreaching on the part of the defendant, there was no need for restoration of the consideration. It is to be noted that even though there was no restoration of the consideration in the *Jordan* case, there was a notice of rescission.

Again in *Meyer v. Haas* (1899), 126 C. 560, 563 cited by appellee (Appellee's Rep. Br. p. 18), there was fraud and deceit on the part of the party attempting to enforce the release. The court stated that the plaintiff had been tricked into signing a contract different in its terms than the one he had made. This, of course, is in no way analogous to the case now under consideration. There has been no claim of any fraud, trick or deceit on the part of appellant causing appellee to sign the release.

In *Wetzstein v. Thomasson* (1939), 34 C.A.2d 554 (Appellee's Rep. Br. p. 18), the person seeking to avoid the release was unable to read or write English, and so, of course, could not read the document he signed. There was also fraud and misrepresentation involved. Once again, there was notice of rescission given by the party seeking to avoid the release. The court said in *Gajanich v. Gregory* (1931), 116 C.A. 622 (Appellee's Rep. Br. p. 18) that in that particular

case there was no need for restoration since the plaintiff had never received anything of value.

In all of the cases cited by appellee for the proposition that there need not be a tender of the consideration received in order to rescind a release, there was fraud and overreaching on the part of the party attempting to enforce the release, or an agent of said party.

None of the cases cited by appellee is authority for appellee's contention that "a tender of the consideration was not essential." The requirements of the California Civil Code regarding rescission were mandatory if appellee wished to rescind the contract (California Civil Code §1566).

**APPELLEE WAS BOUND BY THE RELEASE WHICH SHE
SIGNED, WHETHER SHE READ IT OR NOT.**

Appellee claims that she can be relieved of the effects of the contract because she was mistaken as to its meaning. As pointed out in appellant's opening brief, one who is negligent in not informing himself of the contents of a written contract, signs and accepts the agreement with full opportunity of knowing the true facts, cannot, in the absence of fraud or misrepresentation, avoid liability on the ground that he was mistaken concerning the terms (App. Op. Br. p. 11 and cases cited therein).

Appellee now asserts that because of either fraud, confidential relationship or excusable mistake, she is

not bound by what she signed. In support of this theory she cites three cases on page 10 of her reply brief. An examination of these cases shows that each one is concerned with a situation in which the person seeking to uphold the release was active in securing its execution by means of some sort of fraud or misrepresentation. Of course, in the present case there was no contact between appellee and appellant concerning the release (R.T. p. 35). The record is absolutely devoid of any showing on appellee's part of fraud, misrepresentation, confidential relationship or excusable mistake which would bring her under an exception to the above mentioned general rule. Appellee received the release in the mail from *her own* insurance broker with a note asking her to sign it before a notary (R.T. p. 37). This cannot be called a confidential relationship.

The only explanation of appellee's failure to read the contract of release and her resulting claim of misunderstanding its contents, is that she was careless and negligent. It is the well established rule that where failure to familiarize one's self with the terms of a written contract is traceable solely to carelessness or negligence, neither courts of law nor courts of equity will relieve one from the effects of one's folly. *Roller v. California Pacific Title Ins. Co.* (1949), 92 C.A.2d 149, 154, 206 P.2d 694.

Appellee nowhere gives any reason or excuse for not reading the release.

None of the authorities cited by appellee support her position that she may be relieved from the effect

of the release just because she did not read it. All of the cases cited by appellee involve fraud or a person who was unable to read the contract because of inability to read English or impaired physical condition. This is not the situation in the case at bar. Appellee has no such excuse to justify her own negligence in not reading the document.

CONCLUSION.

For the reasons stated herein and in appellant's opening brief, it is respectfully submitted that the judgment of the trial court below should be reversed, and the cause remanded with a direction to the trial court to enter judgment for the defendant Jean Dobler.

Dated, San Jose, California,

March 10, 1959.

Respectfully submitted,

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Attorneys for Appellant.

No. 16,056

IN THE
United States Court of Appeals
For the Ninth Circuit

CLAUDIA WALLER WALKER,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, and TRANS-
AMERICA CORPORATION,

Appellees.

BRIEF OF APPELLEE
TRANSAMERICA CORPORATION.

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No. 16,056

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CLAUDIA WALLER WALKER,
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AMERICA CORPORATION,
Appellees.

BRIEF OF APPELLEE

TRANSAMERICA CORPORATION.

STATEMENT OF THE CASE.

The complaint in this case was filed October 24, 1955, although the controversy had its origin in 1939, when Miss Walker's mother had her "committed to the Stockton State Hospital." *In re Walker*, 32 Cal. 2d 488, 490. Miss Walker claims that the nervous or mental ailment upon which the commitment was based was caused by the conditions of her employment with Transamerica and Bank of America (Complaint, para. IX (at p. 9)) and draws the conclusion that she should have been allowed workmen's compensation. Complaint, para. V. She alleges Transamerica

and Bank of America concealed this from her until 1948. Complaint, paras. V, X (at p. 23). She admits that she filed a claim with the Industrial Accident Commission which was denied in 1949 and that this denial was affirmed without opinion by the California Supreme Court. Complaint, para. X (at pp. 23-24); [Second] Amendment to Complaint, para. XXII (at p. 13).

Miss Walker attempts to avoid the bar of the statute of limitations by alleging that, although she knew in 1948 she might have a right to workmen's compensation (Complaint, para. X (at p. 23)), she did not have the evidence to support her claim until 1953. Complaint, para. IV. She alleges that this evidence consists of a letter which Arthur Brouillet wrote to a Transamerica employee in 1939 regarding her need for medical care. Complaint, para. IV. Mr. Brouillet was the attorney for her mother as guardian of Miss Walker. The complaint alleges that the existence of this correspondence was denied by Mr. Brouillet in a proceeding before Judge Fitzpatrick in the Probate Department of the Superior Court in San Francisco, and that she was unable to secure this correspondence until 1953, after the death of Mr. Brouillet. Complaint, para. IV. She claims that this "concealment" by Mr. Brouillet tolled the statute as to Transamerica and Bank of America.

Miss Walker asks \$1,000,000 general damages and specific damages of \$56,996, including damages for such items as voice training, rents and subsidies in Alabama, losses on securities and real estate in Cali-

fornia, and an insurance policy taken by Mr. Brouillet in the "illegal guardianship proceeding." Complaint, paras. XI, XII. Although only Transamerica and Bank of America are joined in this action, the complaint is replete with alleged acts by others, including Stanford-Lane Hospital, judges of California courts, a former governor of California, a former district attorney of San Francisco, a former United States attorney in San Francisco, her former physician, Melvin Belli, and J. Edgar Hoover. Complaint, para. X.

The original complaint attempted to use diversity of citizenship as the basis for jurisdiction in the federal court, although Bank of America is a national banking association located in California, and Miss Walker is a citizen of California. Complaint, para. III. Transamerica is a Delaware corporation. Complaint, para III. Shortly after filing the original complaint, Miss Walker filed an amendment claiming jurisdiction in the federal court under a civil rights statute (42 U.S.C. 1985 (3)), which applies to conspiracies to deprive persons of equal protection of the laws. [First] Amendment to Complaint, para. XV. Miss Walker later filed a second amendment alleging that Bank of America was a mere instrumentality of Transamerica. [Second] Amendment to Complaint, para. XVI. She asserted that therefore only the citizenship of Transamerica should be considered for purposes of diversity jurisdiction.

Motions to dismiss were made. The district judge filed an order on January 28, 1955 dismissing the ac-

tion for lack of jurisdiction. Thereafter, Miss Walker filed various motions for additional relief, including a motion for leave to file an amended complaint dropping Bank of America as a defendant. The district judge made a minor correction in one order, but except for that, denied all of these subsequent motions and denied the request for permission to file an amended complaint. The district judge said that Miss Walker could not now ignore Bank of America which she has heretofore pursued with such vigor. The district judge also held that it appears on the face of the proposed amended complaint Miss Walker's claim for relief is barred by the statute of limitations. The district judge pointed out that Miss Walker has admitted that she was aware of the claim in 1948 and did not file this action until October 24, 1955.

ARGUMENT.

Miss Walker is a citizen of California. Bank of America, which is an indispensable party, is a national banking association located in California and is therefore also a citizen of California. Under these circumstances, the district court could not have jurisdiction based upon diversity of citizenship.

The amendment attempting to add the civil rights statute to the complaint did not cure the jurisdictional defect because it applies only to persons acting or purporting to act under state law. Moreover, the conspiracy which Miss Walker attempts to allege would

not be a conspiracy to deprive her of equal protection of the laws, as required by the statute.

The original complaint was based upon the theory that Transamerica and Bank of America had a specific duty to tender medical care to Miss Walker and to inform her mother, who was then her guardian, that the right to workmen's compensation benefits existed. Miss Walker alleges that this specific duty arises under California Workmen's Compensation Law. We find no authority for such specific duty and there can be no cause of action for breach of a nonexistent duty. In any event, Miss Walker's right to workmen's compensation was determined against her by the Industrial Accident Commission and this decision became final on appeal. This court cannot at this time and in this proceeding review that decision.

Finally, even if Miss Walker at one time had a cause of action which she could maintain in the federal courts, it is barred by the statute of limitations, in view of her admission that she learned of the cause of action in 1948, seven years before she filed the complaint in this action.

A. NEITHER THE ORIGINAL COMPLAINT, AS AMENDED, NOR THE PROPOSED AMENDED COMPLAINT CONTAIN SUFFICIENT JURISDICTIONAL ALLEGATIONS.

1. The Original Complaint, as Amended, Did Not Show Diversity Jurisdiction.

The original complaint alleges that appellant is a citizen of California, appellee Transamerica is a Delaware corporation, and appellee Bank of America is a

national banking association. This appears to be an attempt to establish diversity jurisdiction under 28 U.S.C. §1332. However, for jurisdictional purposes, a national bank is a citizen of the state in which it is established or located. 28 U.S.C. §1348; *Cope v. Anderson*, 331 U.S. 461, 467.

Here, by not alleging that Bank of America maintains its principal place of business in a state other than California, appellant has failed to establish diversity jurisdiction as to Bank of America. It is well settled that if the plaintiff is of the same citizenship as any one of the defendants, there can be no diversity jurisdiction because diversity must be complete. *Baltimore & Ohio R. Co. v. Parkersburg*, 268 U.S. 35. Therefore, diversity jurisdiction is absent in the original complaint.

2. Appellant's Allegations in the Second Amendment to the Original Complaint That Bank of America Is a Mere Instrumentality of Transamerica Do Not Aid Her in Establishing Jurisdiction.

Appellant has alleged that Bank of America is a mere instrumentality of Transamerica and hence that the citizenship of Bank of America should be disregarded in determining whether the necessary diversity of citizenship exists. The district court appropriately disposed of this contention in its memorandum opinion of January 28, 1958, as follows:

“Plaintiff has urged that defendant Bank of America is a ‘subsidiary’, ‘a mere instrumentality’ of defendant Transamerica, that Transamerica is ‘the real party defendant’, and has asked that the

Court ignore the Bank of America as a legal entity. Disregarding the question of whether the doctrine of the law of Corporations known as 'Alter Ego' or 'Piercing the Corporate Veil' will apply equally well to an unincorporated banking association as to a corporation, there are not sufficient allegations in any of plaintiff's pleadings to suggest that the Bank of America is not an identifiable and separate legal entity, nor that the Court would be justified in submerging the identity of Bank of America within that of Transamerica. Indeed, inasmuch as plaintiff has named the Bank of America as a party defendant in her action, there is no need for the Court to make such a finding as she proposes. The Court will not base jurisdiction on the ground that one of the named defendants it [sic] no defendant at all."

3. Appellant Failed in Her Amendments to the Original Complaint to Show Jurisdiction Under 28 U.S.C. §1343, Concerning Violations of Civil Rights Statutes.

Section 1343 of Title 28 of the United States Code provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;"

42 U.S.C. §1985(3) provides:

"If two or more persons . . . conspire . . . for the purpose of depriving, either directly or in-

directly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.”

Of course, in order for there to be jurisdiction under section 1343 of Title 28, the complaint must state a claim under section 1985(3) of Title 42. This appellee submits that no such claim is stated.

In the first place, appellees are not alleged to have been state officers nor are they alleged to have acted pursuant to state law. The complaint is therefore deficient for failure to allege state action by appellees. *Davis v. Foreman* (7th Cir.), 251 F.2d 421; *Williams v. Yellow Cab Co. of Pittsburgh, Pa.* (3 Cir.), 200 F.2d 302; see, also, *Collins v. Hardyman*, 341 U.S. 651.

Moreover, even if there were no requirement of state action, the acts alleged to have been done by appellees would not be violations of section 1985(3) because they would not be acts depriving appellant of equal protection of the laws, as required by the statute. This point was made by the United States Supreme Court in *Collins v. Hardyman*, *supra*, which involved an at-

tack by a group upon a public meeting held to discuss national issues and petition the government. There the Court stated at pages 661-662:

“The only inequality suggested is that the defendants broke up plaintiffs’ meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of ‘equal protection’ or of ‘equal privileges and immunities’ than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs’ rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob.”

The same point was made in *Whittington v. Johnston* (5th Cir.), 201 F. 2d 810, a case the facts of which, in the words of the court below, are “remarkably similar” to those alleged by appellant. There the plaintiff complained that the defendants had conspired to, and did, cause her to be declared insane by an Alabama Probate Court when she was in fact sane, and caused her to be confined and denied her right to

be heard. She sued under what is now section 1985(3). The Court said at page 811:

“That section, so far as here material, does not attempt to reach a conspiracy to deprive one of civil rights unless its object is a deprivation of equality,—of ‘equal protection of the laws’, or ‘equal privileges and immunities under the laws’. *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253. It does not purport to create a cause of action for conspiracies to deny due process. Yet the burden of the conspiracy counts is, not that the defendants conspired to deny plaintiff equality under the law, but that they conspired to deprive plaintiff of her liberty without due process. The two propositions are quite distinct. They are not equivalents. *Mitchell v. Greenough*, 9 Cir., 100 F.2d 184; *McShane v. Moldovan*, 6 Cir., 172 F.2d 1016; *Allen v. Corsano*, D.C., 56 F.Supp. 169. No facts are pleaded which show that plaintiff has been subjected to any inequality of treatment. There is no charge that by said proceedings she has been subjected to any different or greater hazard than any other person against whom the Alabama statutes might be invoked, nor that she was deprived of any right or immunity which might be enjoyed by any other person under the law. It is clear that the conspiracy counts state no cause of action under 8 U.S.C.A. §47(3). *Collins v. Hardyman*, *supra*.”

4. Appellant's Allegations That Appellees Violated Federal Banking Statutes Do Not Show Jurisdiction.

Throughout appellant's original complaint and her proposed amended complaint there are allegations that appellees violated the national banking laws. Appar-

ently appellant believes that such allegations give her jurisdiction to sue in the federal courts. [Second] Amendment to Complaint, para. XVIII. Obviously, she is in error. Only the Comptroller of Currency can complain of such acts. 12 U.S.C. §93.

5. To the Extent That Appellant Relies Directly Upon Rights Accorded Her by the California Workmen's Compensation Law, the District Court Had No Jurisdiction.

Much, if not all, of appellant's claims boils down to an assertion of rights under the California Workmen's Compensation Law. The District Court has no jurisdiction over such claims. The reasons why are, for convenience, set forth in part B, *infra*, discussing appellant's failure to state a claim upon which relief can be granted.

6. The Elimination of Bank of America as a Defendant in the Proposed Amended Complaint Does Not Aid Appellant in Establishing Diversity Jurisdiction.

In the proposed amended complaint appellant, a citizen of California, sues only Transamerica, which is a Delaware corporation. It was her contention that by eliminating Bank of America, which for purposes of diversity jurisdiction is deemed a citizen of California (see *supra*), she had established the complete diversity necessary to sustain jurisdiction. The District Court correctly ruled, however, that it appeared from appellant's prior pleadings that Bank of America was an indispensable party. Under such circumstances, there can be no jurisdiction, although Transamerica is sued alone. 54 Am.Jur., United States Court, §66.

B. THE ORIGINAL COMPLAINT, AS AMENDED, AND THE PROPOSED AMENDED COMPLAINT EACH FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The original complaint, as amended, and the proposed amended complaint are so nearly identical in most respects that it is convenient to consider them together in determining whether appellant did or could state a claim upon which relief could be granted. The only exception concerns appellant's attempt to state a claim based upon 42 U.S.C. §1985(3), the civil rights statute. This is contained in the amendments to the original complaint, but is omitted from the proposed amended complaint. That appellant has not stated a claim under that section is, we believe, amply demonstrated in the part of this brief regarding the absence of jurisdiction, *supra*. Appellant's other asserted claims are also without merit.

1. Appellant Cannot State a Claim Against Appellees for Violation of a Duty to Tender Medical Care to Appellant in 1939.

Appellant seems to take the position that under the California Workmen's Compensation Law appellees were obligated to provide her with medical care upon learning of her illness. Appellant fails to cite any case holding that an employer is liable under the California Workmen's Compensation Law for an employee's mental disability not caused by a physical injury incurred in his employment, and this appellee knows of no such case. Appellant's pleadings, therefore, fail to set forth sufficiently her right ever to have received workmen's compensation benefits.

Assuming, however, for the purpose of argument, that appellant suffered a compensable injury, what were her rights under the Workmen's Compensation Law? Section 4600 of the California Labor Code provides in part:

"Medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including artificial members, which is reasonably required to cure or relieve from the effect of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

It is apparent from the second sentence quoted above that an employer's liability for failure to provide medical treatment stands on no different footing than any other compensation payable under the Workmen's Compensation Law. See, also, Labor Code §§ 3207, 5001. Damages for failure to provide medical treatment could be obtained only through the same procedures as would be used to obtain other workmen's compensation benefits, that is, by a proceeding before the Industrial Accident Commission. Labor Code, §§ 5300, 5304. The Industrial Accident Commission's jurisdiction is exclusive. See *Hazelwerdt v. Industrial Indemn. Exchange*, 157 Cal. App. 2d 759, and cases cited therein. Therefore, appellant has no claim which she may assert in the federal courts. It is true that in some states which provide for enforce-

ment of their workmen's compensation acts by resort to the courts of such states, resort may be had to the federal courts where there is diversity. However, it has always been understood that in states which provide an administrative remedy, such as California, the federal courts will not take the case except in the form of an appeal from the administrative determination (see *Fresquez v. Farnsworth & Chambers Company* (10th Cir.) 238 F. 2d 709; *Valencia v. Stearns Roger Mfg. Co.* (D.C.N.M.), 124 F. Supp. 670), if, in fact, the federal courts will touch the case at all. See *Decker v. Spicer Mfg. Division of Dana Corp.* (D.C. N.D. Ohio) 101 F. Supp. 207.

Finally, it appears from her pleadings that appellant has already litigated her workmen's compensation rights before the Industrial Accident Commission and the California courts and the litigation was determined adversely to her. She is therefore barred by principles of *res judicata* from relitigating her claims.

2. The Allegations in Appellant's Pleadings That Appellees Failed to Advise Her Mother of Her Alleged Workmen's Compensation Rights Fail to State a Claim Upon Which Relief Can Be Granted.

It appears from the Brouillet letters quoted in the original complaint that when one Lockhart (who is alleged to have been a Transamerica employee) was advised by Brouillet that appellant required some funds for treatment, Lockhart replied that appellant's former co-workers were unwilling to make any contribution. Appellant says that by failing to advise her mother at that time that appellant was entitled to

workmen's compensation benefits, appellees committed fraud. We have not, however, found any authority to indicate that an employer is obligated to inform an injured employee of his workmen's compensation rights.

Appellant goes a step further in her proposed amended complaint and alleges that her employers acting by and through Lockhart advised her mother that appellant was entitled to no benefits. She does not say that appellees advised her mother that she was not entitled to workmen's compensation benefits, but simply that she was entitled to no benefits. It would seem from the Brouillet letters quoted in the original complaint that Lockhart clearly meant that she was not entitled to any *charitable* benefits. But even if appellant should allege that appellees advised her mother that appellant was not entitled to any workmen's compensation benefits, this would not constitute an actionable misrepresentation if it were false because it would be a representation of *opinion* and of *law* (made by a layman to her mother's lawyer). Moreover, by the very nature of the representation it could not be known to be false because it could not be certain that appellant had incurred her disability as a result of her work or that if she had she would have been entitled to benefits.

Finally, it would appear that the fraudulent concealment of a cause of action does not create a new cause of action, but merely extends the statute of limitations as to the concealed cause of action. Thus it is held that where a defendant fraudulently conceals

from plaintiff the fact that he has a cause of action, the statute of limitations is the statute for the concealed cause of action and not the fraud statute, although like the fraud statute it does not begin to run until "discovery". 1 Witkin, California Procedure, Actions, § 173, p. 686. The significance of the distinction is that if no new cause of action is created, then the proper forum is the Industrial Accident Commission because the complaint is essentially based upon the Workmen's Compensation Law and not upon the law of fraud.

3. Appellant Has Not Stated a Claim Upon the Basis of Allegations That Appellees Concealed the Evidence That Her Mother Had Given a Notice of Illness to Appellees in 1939.

Appellant has alleged that she was unable to establish her workmen's compensation claim in 1948 because she was unable to prove that a notice of her illness had been given to her employers in 1939. She claims that such notice was contained in a letter from Brouillet to Lockhart, an employee of appellees. In her proposed amended complaint she has alleged in addition that her claim was denied in 1948 because it had not been filed in 1939. The latter allegation apparently has reference to the fact that appellant's claim was barred for failure to commence proceedings within one year after the injury, as required by Labor Code § 5405. See, also Labor Code §§ 5407, 5408. While appellant suffered her injury no later than 1939, she commenced her proceedings no earlier than 1948. Her action was therefore barred regardless of whether she had evidence of notice. Hence, she can-

not predicate a cause of action on the alleged concealment of the evidence of notice.

Even if appellant's claim had not been barred by the one year statute of limitations, evidence of the letter which she asserts was "notice" would not have aided her in establishing her claim. The relevance of notice is explained in Labor Code § 5400, which provides in part:

"* * * [N]o claim to recover compensation under this division shall be maintained unless within 30 days after the occurrence of the injury which is claimed to have caused the disability * * * there is served upon the employer notice in writing signed by the person injured or someone in his behalf, * * *."

However, it is not any notice which will suffice. The notice must contain certain facts under Labor Code § 5401, which provides:

"The notice shall state:

(a) The name and the address of the person injured.

(b) The time and the place where the injury occurred.

(c) The nature of the injury."

The quotations of the letter from Brouillet to Lockhart in the original complaint do not indicate that the above requirements of a valid notice were met.

In addition, it is provided in Labor Code § 5402 that knowledge by the employer of a claim of injury received from any source is equivalent to notice under

section 5400. Labor Code § 5403 provides that the failure to give notice is not a bar to recovery if the employer was not in fact misled or prejudiced by the failure. Appellant asserts that appellees should have advised her of her workmen's compensation rights. How could they have done so if they did not know she was injured in connection with her employment? And if they knew such fact, how could they have been prejudiced by not receiving the notice? If they were not prejudiced, the fact of whether notice was given or not would be immaterial.

Furthermore, it would seem that regardless of whether or not there was in fact notice as contemplated by section 5400, appellant is conclusively barred from showing that such notice was given because the determination in the Industrial Accident Commission proceedings that notice was not given is *res judicata* or at least operates as a collateral estoppel. See "Res Judicata as regards decisions or awards under the workmen's compensation acts", 122 A. L. R. 550; see also, *Scott v. Industrial Acc. Com.*, 46 Cal. 2d 76; *French v. Rishell*, 40 Cal. 2d 477; *Duprey v. Shane*, 39 Cal. 2d 781; *Liberty Mut. Ins. Co. v. Superior Court*, 62 Cal. App. 2d 601; *Godman Bros. v. Superior Court*, 51 Cal. App. 2d 297.

Appellant alleges that Brouillet falsely testified that the alleged notice had not been given. She does not allege that at any time she believed or relied upon Brouillet's testimony. Furthermore, appellant should be deemed to know what her mother as her agent knew. Since she alleges that it was her mother who

contacted appellant's employers, her mother must have known all about the notice. Moreover, plaintiff admits in her pleadings that she knew of the alleged notice in 1948. Hence she can not have relied on Brouillet's testimony.

It is plain, therefore, that any cause of action which appellant might have based upon the Brouillet testimony is not for fraud in the conventional sense. Instead, it seems that plaintiff seeks to predicate her action simply on the alleged fact that Brouillet committed perjury. The law, however, does not provide for such an action in the absence of statute. 38 Cal. Jur. 2d, Perjury, § 53.

C. ANY ACTION WHICH APPELLANT MIGHT HAVE HAD IS BARRED BY THE STATUTE OF LIMITATIONS.

1. The Civil Rights Action Is Barred by the Statute of Limitations.

Appellant's claim based upon 42 U.S.C. § 1985(3), the civil rights statute, is barred by the statute of limitations. Since there is no federal statute of limitations applicable to the civil rights statutes, it has been held that the state statute of limitations applies. *O'Sullivan v. Felix*, 233 U.S. 318; *Wilson v. Hinman* (10th Cir.), 172 F. 2d 914; *Gordon v. Garrson* (D.C. E.D. Ill.), 77 F. Supp. 477.

There are several California statutes that could conceivably govern: Code of Civil Procedure § 338(1)—an action upon a liability created by statute, other than a penalty or forfeiture; Code of Civil Procedure § 338(4)—fraud; Code of Civil Procedure § 339(1)—

an action upon a liability not founded upon an instrument in writing; Code of Civil Procedure §343—an action not otherwise provided for. The longest period provided is four years. Thus any action which appellant might have had upon the basis of the civil rights statute expired in 1943 at the latest.

2. Any Claim Which Appellant Might Have Which Is Before the Court on Diversity Jurisdiction Is Also Governed by California Law With Respect to the Statute of Limitations.

In addition to controlling with respect to the statute of limitations for the civil rights action, California law also governs as to the period of limitations for any action appellant might have had where jurisdiction is based on diversity of citizenship. *Guaranty Trust Co. v. York*, 326 U. S. 99; *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530. Accordingly, we must look to California law to determine if any claim appellant might have had based upon the Workmen's Compensation Law or based upon fraud is barred.

3. Any Action Based Upon a Claim for Workmen's Compensation Is Barred by the Statute of Limitations.

Any action which appellant might have been able to bring upon the basis of the Workmen's Compensation Law expired at the latest in 1940 under Labor Code §§ 5405, 5407, 5408.

4. Any Action Which Appellant Might Have Had for Fraud Is Barred by the Statute of Limitations.

The acts which appellant alleges constituted fraud by appellee occurred in 1939. Subsection 4 of section

338 of the Code of Civil Procedure provides a three year statute of limitations for actions grounded upon fraud. Any action which appellant might possibly have had for fraud was therefore *prima facie* barred in 1942.

However, the statute also provides that "[t]he cause of action in such case [shall] not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud . . ." This discovery provision has been interpreted in many California cases. These cases hold that the statute commences running when the plaintiff in the exercise of reasonable diligence should have discovered his cause of action. They also lay down strict rules regarding the pleading of discovery. This has been summarized in 1 Witkin, California Procedure, Actions, § 143, pp. 652-653:

"C.C.P. 338(4) adds the statement (commonly found in fraud statutes of limitation: see 63 Harv. L. Rev. 1217): 'The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' Literally interpreted, this language would give the plaintiff an unlimited period to sue if he could establish ignorance of the facts. But the courts have read into the statute a duty to exercise diligence to discover the facts. The rule is that the plaintiff must *plead and prove the facts* showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actu-

ally discover the fraud or mistake. Under this rule constructive or presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run. Many cases, both old and new, strictly apply these requirements to bar actions brought after lapse of the 3-year period. . . .”

Witkin cites an army of cases for the above statements, including the oldest and best known, *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482. The California rules for pleading discovery, of course, apply in the federal courts when the California statute of limitations is applicable. *Prentiss v. McWhirter* (9th Cir.), 63 F. 2d 712; *Sears, Roebuck & Co. v. Blade* (D.C.S.D. Cal.), 123 F. Supp. 131.

Appellant has not alleged lack of knowledge of the facts as she must in order to escape the bar of the statute of limitations. More important, her pleadings clearly show that she could not amend to allege lack of knowledge, for she had already affirmatively alleged that she knew of the asserted fraud in 1948. It is true that she has alleged that she was unable to obtain the evidence she thought would substantiate her claims until 1953. However, as the District Court correctly pointed out in its order denying appellant's motion to file her proposed amended complaint, the statute of limitations for an action within a plaintiff's knowl-

edge is not tolled while he searches for evidence to support it. The court stated:

“It is true that fraudulent concealment of a claim for relief is sufficient to toll the statute of limitations. *Kimball v. Pacific Gas & Electric Co.*, 220 C. 203. However, it is also true that the statute governing the commencement of actions will start to run when the plaintiff becomes aware of the claim for relief. The plaintiff has here confused the discovery of the claim for relief with the discovery of the evidence which would substantiate that claim.

“Consequently, inasmuch as it appears affirmatively from the face of the proposed amended complaint that plaintiff was aware of her claim for relief in 1948, but did not file the action until 1955, that the claim is barred by California Code of Civil Procedure § 338[4].”

5. The Statutes of Limitation for Actions Not Based Upon Fraud Commenced Running at the Latest in 1948.

It is true that the statute of limitations for actions not themselves based upon fraud may be tolled by fraudulent concealment of the causes of action. However, the pleading requirements for tolling the statute for fraudulent concealment are the same as the pleading requirements where an action for fraud is brought more than three years after the fraud. See 1 Witkin, California Procedure, Actions, § 173, pp. 685-686; 31 Cal. Jur. 2d, Limitation of Actions, § 202. Consequently, the period of limitations for *any* action appellant might have had would have commenced running at the latest in 1948, when appellant admittedly knew of her alleged cause of action.

6. The Defense of the Statute of Limitations May Be Raised by a Motion to Dismiss.

Where a complaint shows on its face, as all of appellant's pleadings did, that the statute of limitations has run, it fails to state a claim upon which relief can be granted. Consequently, the defense of the statute of limitations in such instances may be raised by a motion to dismiss. *Sukow Borax Mines Consolidated v. Borax Consolidated* (9th Cir.), 185 F. 2d 196; *Kincheloe v. Farmer* (7th Cir.), 214 F. 2d 604; *Gossard v. Gossard* (10th Cir.), 149 F. 2d 111; *Sears, Roebuck & Co. v. Blade* (D.C.S.D.Cal.), 123 F. Supp. 131; *Abram v. San Joaquin Cotton Oil Co.* (D.C.S.D. Cal.), 46 F. Supp. 969.

D. THE MOTION TO DISMISS WAS FILED WITHIN THE ALLOWABLE PERIOD.

Since this appellee's motion to dismiss was filed within the time extended by the District Court, there can be no question of any of its rights being waived by failure to plead within twenty days of the service of the complaint. Moreover, lack of jurisdiction and failure to state a claim are never waived.

CONCLUSION.

Appellant's pleadings fail to show jurisdiction in the federal courts. Moreover, they fail even to allege a claim upon which relief could be granted in any court, federal or state. Most important, they affirma-

tively show that under no circumstances could appellant amend to cure these defects. Accordingly, appellee Transamerica Corporation requests that the order of the District Court dismissing appellant's action be affirmed.

Dated, December 23, 1958.

Respectfully submitted,

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Transamerica Corporation.

No. 16,056

In the

United States Court of Appeals

For the Ninth Circuit

MISS CLAUDIA WALKER,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and TRANSAMERICA
CORPORATION,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California

**Brief of Appellee Bank of America
National Trust and Savings Association**

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Opinion Below

There is no reported opinion of the District Court; however, the opinion of the Court is fully stated in the Memorandum and Order dated January 28, 1958, dismissing the action (Record on Appeal, hereinafter designated R., Doc. 20).

I.

Statement as to Jurisdiction

1. The District Court did not have jurisdiction and hence the dismissal of the action was proper.

2. This Court lacks jurisdiction because (a) the notice of appeal to the principal order appealed from was filed too late as to Appellee Bank and (b) the other orders appealed from were not final.

1. THE DISTRICT COURT DID NOT HAVE JURISDICTION AND HENCE THE DISMISSAL OF THE ACTION WAS PROPER.

The principal order appealed from and the only possible final order is the Memorandum and Order of the District Court dated January 28, 1958 dismissing the action (R. Doc. 20), and the sole question involved is whether or not the District Court had jurisdiction. Since this question represents the principal issue in this case on appeal (if this court has jurisdiction as to Appellee Bank), it is considered hereinafter under Argument.

2. THIS COURT LACKS JURISDICTION BECAUSE (A) THE NOTICE OF APPEAL TO THE PRINCIPAL ORDER APPEALED FROM WAS FILED TOO LATE AS TO APPELLEE BANK AND (B) THE OTHER ORDERS APPEALED FROM WERE NOT FINAL.

The principal order appealed from is that entitled "Memorandum and Order" dated January 28, 1958, based on defendants' Motion to Dismiss for Lack of Jurisdiction. Thus the normal time for filing a Notice of Appeal would expire after thirty days, i.e., on February 27, 1958 [Rule 73(a)] unless otherwise extended. The Notice of Appeal was actually not filed until May 16, 1958.

The time in which a notice of appeal may be filed may of course be extended by the filing of a motion under the provisions of Rule 50(b) granting or denying a motion for judgment; or 52(b) to amend or make additional findings of fact; or Rule 59 to alter or amend the judgment or as

to a new trial. [Rule 73(a)]. Such motions must be made within ten days from the order at which such motions are directed. The only subsequent motion filed by Appellant that would appear to be possibly within this category and time is the motion entitled "Motion to Set Aside Order of Dismissal and for Leave to File Amended Complaint" filed on February 7, 1958. Assuming for the sake of argument that this motion falls within the classification specified in Rule 59(e) as a motion to alter or amend a judgment, it should be observed that this motion relates only to Transamerica Corporation and not to Appellee Bank of America National Trust and Savings Association. Indeed to effectuate the end sought by Appellant in this motion it was necessary that the action remain dismissed as to Appellee bank. The whole purpose of this motion was to avoid the jurisdictional difficulty inherent because Appellee bank was a party and to direct the action solely against Transamerica Corporation since in this manner jurisdiction in the District Court could be obtained. Appellee bank was not a party to this motion. It seems clear then that in so far as Appellee bank is concerned, no motion was filed which affected it within ten days from January 28, 1958. Thus the conclusion is that as to Appellee bank the Notice of Appeal was filed too late.

This motion to set aside the dismissal and to file an amended complaint was in any event denied under a Memorandum and Order dated and filed April 18, 1958. (R. Doc. 22) Although plaintiff has designated this particular order as appealed from in her Notice of Appeal, it appears clearly that this order is of a procedural nature and not a final order subject to appeal under the provisions of 28 USC 1291.

In so far as the motion was an effort to set aside the dismissal, the language of this court in *Hicks v. Bekins Mov-*

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In so far as the motion was an effort to set aside the dismissal, the language of this court in *Hicks v. Bekins Mor-*

ing & Storage Co., 115 F.2d 406, 409 (9th Cir. 1940) appears to be apposite and is as follows:

“On the attempted appeal from the order of the court below denying plaintiff’s motion to vacate the order of dismissal, it is to be observed that, save in certain instances or exceptions not now material, this court has the jurisdiction to review only final decisions. 28 U.S.C.A. § 225. An order of dismissal is a final judgment from which an appeal will lie. *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, *supra*; *Wilson v. Republic Iron & Steel Co., et al.*, 257 U.S. 92, 96, 42 S.Ct. 35, 66 L.Ed. 144. But an order denying a motion to vacate an order of dismissal is not such a final order for it is ‘The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree, or order [Cases cited.]’ *Republic Supply Co. of Calif. v. Richfield Oil Co. of Calif.*, 9 Cir., 74 F.2d 909, 910. See also *Bensen v. United States*, 9 Cir., 93 F.2d 749. In the circumstances, therefore, we have no alternative but to dismiss the appeal in No. 9510.”

See also *Simons v. United States*, 162 F.2d 905 (9th Cir. 1947)

Again an order denying leave to file an amended complaint is not an appealable order. *Kulesza v. Blair*, 41 F.2d 439 (7th Cir. 1930) Cert. den. 282 U.S. 883. Although the case involved the question of amending an answer, the logic as to the question of appealability would be the same and this court has held that an order denying leave to file an amendment to an answer is not a final order and thus not appealable. *Hancock Oil Co. v. Universal Oil Products Co.*, 120 F.2d 959 (9th Cir. 1941) Cert. den. 314 U.S. 666.

Appellant has also appealed from the Amendment to Memorandum and Order dated and filed May 7, 1958 (R. Doc. 30) in response to Appellant’s Motion to Amend the

Order of April 18, 1958. Once again it is apparent from the cases already cited that this Order is of a procedural and corrective nature and not final in the sense of being appealable.

The next order specifically appealed from is the Memorandum and Order dated May 12, 1958, and filed May 13, 1958 (R. Doc. 34), in response to Appellant's earlier "Motion for Relief from Order under Rule 60(b) [newly discovered evidence]." (R. Doc. 31) This motion was recognized by the court as being a procedural impossibility under the facts of this case. In this connection the District Court stated: (R. Doc. 34, p. 2)

"The plaintiff has stated in the document now before the Court that she will move for relief from the aforementioned orders under the provisions of Rule 60(b) Federal Rules of Civil Procedure 'on the ground that plaintiff has discovered new evidence.' The rule reads as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); * * *"

"There has never been a trial in this action, nor the introduction of any evidence; the matter was dismissed upon the state of the pleadings, from which it appears that the Court is without jurisdiction in the matter. Inasmuch as it is impossible for the plaintiff to move for a *new* trial, the document must be taken as something in the nature of a petition for a rehearing."

Since the circumstances which would permit a motion under Rule 60(b) did not exist the motion ~~as~~^{WAS} either a nullity or to have standing would have to be treated as a motion for

rehearing. Considering the motion as essentially one for a rehearing and which challenges the correctness of the order of dismissal, its denial would not be an appealable order. In *United States v. Muschany*, 156 F.2d 196, 197 (8th Cir. 1946) the court said:

“A timely motion which challenges the correctness of a judgment or order is intended to afford the trial court an opportunity to reconsider its action in entering the judgment and to amend it. The motion merely postpones the finality of the judgment and extends the time for appeal from the judgment. An appeal from the denial of such a motion is not an appeal, or the equivalent of an appeal, from the judgment or order the modification of which is sought. In *re Schulte-United, Inc.*, 8 Cir., 59 F.2d 553, 559; *State of Missouri v. Todd*, 8 Cir., 122 F.2d 804, 806; *Jones v. Thompson*, 8 Cir., 128 F.2d 888, 889; *Brown v. Thompson*, 8 Cir., 150 F.2d 171, 172-173. The appeal lies from the final judgment or order challenged by the motion, and not from the District Court’s refusal to modify it. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149, 150 63 S.Ct. 133, 87 L.Ed. 146; *Bowman v. Loperena*, 311 U.S. 262, 266, 61 S.Ct. 201, 85 L.Ed. 177; *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137, 57 S.Ct. 382, 81 L.Ed. 557; *Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145, 27 S.Ct. 50, 51 L.Ed. 128; *Alexander v. Special School District of Booneville*, 8 Cir., 132 F.2d 355, 358; *Brown v. Thompson*, *supra*, 150 F.2d 171, pages 172-173.”

The last Memorandum and Order appealed from dated and filed on May 19, 1958 (R. Doc. 38), was a denial of the last motion made by Appellant based on Rule 60(b) [fraud]. It is true that in certain situations the courts have considered the denial of a motion based upon fraud as an appealable order on the theory that there was in effect an

independent action arising out of the fraud; however, such facts do not appear in this case. The only so called fraud alleged, as indicated by the affidavit of appellant filed in support of her motion, is stated as follows:

“That on January 16, 1956, or on the actual date of the hearing of defendants’ motions to dismiss filed in the above cause, which admitted and conceded all of the facts of plaintiff’s complaint to be true, George Chadwick, Jr. in the presence of this plaintiff, and affiant, told the above entitled court that ‘if all of the facts stated by plaintiff were admitted to be true, this would be of no benefit to plaintiff.’” (R. Doc. 35, p. 2 of attached affidavit)

A simple reading of the above is sufficient to indicate that what has been termed fraud is no fraud at all. The quoted statement made in connection with the argument on the motion to dismiss was of course entirely true since, as found by the District Court and as hereinafter indicated in the Argument, Appellant had not stated a cause of action within the jurisdiction of the District Court. A statement by counsel of the theory upon which he is proceeding is certainly not fraud in any sense of the word.

In conclusion as to the jurisdiction of this court on this appeal it may be said:

(a) As to the order of January 28, 1958, the notice of appeal as to Appellee bank was filed too late.

(b) The other orders appealed from were not final orders under 28 USC 1291.

It is therefore submitted that the sole jurisdiction of this court is to dismiss this appeal in so far as Appellee bank is concerned.

II.

Statement of the Case

Appellant filed in the District Court a Complaint naming Appellee bank and Transamerica Corporation as defendants. This Complaint charged Appellees with mistreatment of the Appellant as an employee and also charged Appellee bank with violation of the national banking laws.

Appellees moved to dismiss the Complaint because of lack of jurisdiction in the District Court and this Motion was granted by the District Court (Memorandum and Order of January 28, 1958) on the grounds that there was no diversity of citizenship and no federal question.

Subsequent to the Memorandum and Order of January 28, 1958, Appellant filed four motions all of which were attacks in one way or another on the order dismissing the action. (See foregoing statement as to jurisdiction for an indication of the nature of each motion). Except in a single instance where the District Court substituted certain language for that used in a prior order, all of Appellant's motions were denied by the District Court and Appellant has appealed from the order of dismissal of January 28, 1958, and from all of the subsequent orders denying Appellant's motions.

III.

Argument

Assuming for the purposes of argument that this court has jurisdiction as to Appellee bank to hear this appeal, there appears to be no question but that the District Court was correct in dismissing the action based upon a lack of diversity of citizenship and failure to state a federal question.

(1) THE QUESTION AS TO DIVERSITY OF CITIZENSHIP.

It is clear that for the purposes of jurisdiction in the federal courts a national bank is considered to be a citizen of the state wherein it is located. Both Appellant and Appellee bank are citizens of California. Appellant has called attention to 12 USC 94 which is primarily a venue statute, but has ignored 28 USC 1348 which reads as follows:

“The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

“All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.”

The language of the District Court in its Memorandum and Order of January 28, 1958, covers this situation so well that it is quoted herein: (R. Doc. 20, p. 3)

“It is a fundamental rule in the federal courts that where jurisdiction is claimed to arise from diversity of citizenship of the parties and there are several parties plaintiff or defendant, and the parties on the same side are citizens of different states, that all parties on the same side must be capable of suing or being sued within the district where the action is brought. In this case, each defendant must be liable to suit in this Court; otherwise, the controversy would not be among citizens of different states. See: *Shainwald v. Lewis*, 108 U.S. 158, 2 S.Ct. 385, 7 L.Ed. 691; *Sewing Machine Co's Case*, 18 Wall. 553, 21 L.Ed. 914; *Sweeney v. Carter Oil Co.*, 199 U.S. 252, 26 S.Ct. 55, 50 L.Ed. 158.

"Plaintiff has urged that defendant Bank of America is a 'subsidiary', 'a mere instrumentality' of defendant Transamerica, that Transamerica is 'the real party defendant', and has asked that the Court ignore the Bank of America as a legal entity. Disregarding the question of whether the doctrine of the law of Corporations known as 'Alter Ego' or 'Piercing the Corporate Veil' will apply equally well to an unincorporated banking association as to a corporation, there are not sufficient allegations in any of plaintiff's pleadings to suggest that the Bank of America is not an identifiable and separate legal entity, nor that the Court would be justified in submerging the identity of Bank of America within that of Transamerica. Indeed, inasmuch as plaintiff has named the Bank of America as a party defendant in her action, there is no need for the Court to make such a finding as she proposes. The Court will not base jurisdiction upon the ground that one of the named defendants is no defendant at all.

"It follows that inasmuch as there is no diversity of citizenship between plaintiff and defendant Bank of America, the Court has no discretion in the matter, and finds that it has no jurisdiction over the controversy on the basis of diversity of citizenship of the parties."

(2) THE QUESTION OF WHETHER A FEDERAL QUESTION EXISTS.

(a) The Civil Rights Statute as a basis for jurisdiction.

Once again the statement by the District Court in its Memorandum and Order of January 28, 1958, appears to consider and answer this question fully. The pertinent portion of the Memorandum follows (R. Doc. 20, p. 4)

"Plaintiff has alleged that the jurisdiction of the Court may be found in 42 U.S.C.A. § 1985(3), a section of the Civil Rights statutes concerning conspiracies which deprive individuals of the several rights and privileges which they enjoy as citizens of the United States of America. Although the statute was originally

intended by Congress as a protection and guaranty of equality under the law for the members of the various races, subsequent interpretation of the enactment has brought under its aegis all of those groups and classes which conform to the necessary standards of 'reasonable classification' within the national social structure. The statute protects the individual against a conspiracy designed to deprive him of the equal protection of the laws, or of equal privileges and immunities under the laws; it is not a catch-all omnibus which authorizes the recovery of damages from one individual for his trespass against another; rather, it is directed toward any state action or any act which is done under 'color of state law.' See: *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 1253. Although plaintiff has included the phrase—'under color of state law'—within her pleadings, there is no showing that the defendants acted in other than individual capacities. Making representations to a state official, even in a report required by law, is not acting 'under color of law' within the Civil Rights statutes. *Schatte v. Int'l. All. of Theatrical Stage Employees & Moving Picture Operators of U. S. & Canada*, 182 F.2d 158, re. den. 183 F.2d 685, Cert. den. 340 U.S. 827, 71 S. Ct. 64, 95 L. Ed. 608, re. den. 340 U.S. 885, 71 S. Ct. 194, 95 L. Ed. 643.

"In a recent Alabama case in the Federal Court, a plaintiff complained that the defendants had conspired to and did, cause her to be declared insane by an Alabama Probate Court when she was in fact sane, caused her to be confined and denied her a right to be heard. The facts are remarkably similar to those alleged by plaintiff Claudia Waller Walker. Plaintiff in the Alabama case then filed suit in the United States District Court and claimed that she was entitled to relief under the same Civil Rights statute. The Court stated:

"That section (referring to 42 U.S.C.A. § 1385 [3]), so far as here material, does not attempt to reach a

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"That section (referring to 42 U.S.C.A. § 1385 [3]), so far as here material, does not attempt to reach a

conspiracy to deprive one of civil rights unless its object is a deprivation of equality,—of “equal protection of the laws,” or “equal privileges and immunities under the laws”. (Citing *Collins v. Hardyman, supra*). It does not purport to create a cause of action for conspiracies to deny due process. Yet the burden of the conspiracy count is, not that the defendants conspired to deny plaintiff equality under the law, but that they conspired to deprive plaintiff of her liberty without due process. The two propositions are quite distinct. They are not equivalents. (Citing cases). No facts are pleaded which show that plaintiff has been subjected to any inequality of treatment. There is no charge that by said proceedings she has been subjected to any different or greater hazard than any other person against whom the Alabama statutes might be invoked, nor that she was deprived of any right or immunity which might be enjoyed by any other person under the law. It is clear that the conspiracy counts state no cause of action under 8 U.S.C.A. § 47(3).’ *Whittington v. Johnston*, 201 F. 2d 810 (U.S.C.A. 5th 1953) cert. den. 346 U.S. 867, 74 S.Ct. 103, 98 L. Ed. 377.”

“In the case before the Court, plaintiff’s plethoric pleadings are filled with conclusions of law and irrelevant evidentiary matter, the substance of which is that she has been denied due process of law, rather than that she was denied the protection which is within the purview of the statute; nowhere has she alleged ultimate facts which are sufficient to state a claim for relief. Inasmuch as plaintiff’s claim for relief as based upon 42 U.S.C.A. 1985(3) is without merit, the Court is without jurisdiction in the matter.”

(b) Alleged violation of national banking laws.

Inherent in Appellant’s contentions appears to be the thought that her allegations of infractions of the national

banking laws provides a basis for jurisdiction when the Comptroller has failed to act. However by statute actions in this area may only be maintained by the Comptroller of the Currency and his action or nonaction would not appear to support the jurisdiction of the District Court as to an action by an individual. 12 USC 93 reads as follows:

“If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. *Such violation shall, however, be determined and adjudged by a proper circuit, district or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name,* before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damage which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.” (Emphasis supplied)

In so far as actions by individuals are concerned, the above statute only authorizes actions against directors of the national bank involved. It would appear that this particular statute has no relevancy at all to support the claim of Appellant that the District Court had jurisdiction as to Appellee bank.

(c) The Fair Labor Standards Act.

Although the point is new and does not appear to be based upon the record in this case, Appellant, nevertheless, beginning at Page 29 of her brief, suggests that the District Court had jurisdiction under the Fair Labor Standards

conspiracy to deprive one of civil rights unless its object is a deprivation of equality,—of “equal protection of the laws,” or “equal privileges and immunities under the laws”. (Citing *Collins v. Hardyman, supra*). It does not purport to create a cause of action for conspiracies to deny due process. Yet the burden of the conspiracy count is, not that the defendants conspired to deny plaintiff equality under the law, but that they conspired to deprive plaintiff of her liberty without due process. The two propositions are quite distinct. They are not equivalents. (Citing cases). No facts are pleaded which show that plaintiff has been subjected to any inequality of treatment. There is no charge that by said proceedings she has been subjected to any different or greater hazard than any other person against whom the Alabama statutes might be invoked, nor that she was deprived of any right or immunity which might be enjoyed by any other person under the law. It is clear that the conspiracy counts state no cause of action under 8 U.S.C.A. § 47(3).’ *Whittington v. Johnston*, 201 F. 2d 810 (U.S.C.A. 5th 1953) cert. den. 346 U.S. 867, 74 S.Ct. 103, 98 L. Ed. 377.”

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Although the point is new and does not appear to be based upon the record in this case, Appellant, nevertheless, beginning at Page 29 of her brief, suggests that the District Court had jurisdiction under the Fair Labor Standards

Act of 1938, 29 USC 201 et seq. as a result of employment in 1939. In this connection it appears that if Appellant ever had such a cause of action it is at the present time forever barred. It should be a sufficient answer to this contention to refer to 29 USC 255 which reads as follows:

“§ 255. *Statute of limitations*

“Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

* * * * *

“(b) if the cause of action accrued prior to May 14, 1947,—may be commenced within whichever of the following periods is the shorter; (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;”

(3) APPELLANT'S SPECIFICATION OF ERRORS.

Although as indicated Appellant has appealed from five orders of the District Court there are only three specifications of errors and the only orders specifically referred to are the Memorandum and Order of January 28, 1958, and the Memorandum and Order of May 19, 1958 issued subsequently to the Notice of Appeal but included therein.

As to the first order, Appellant's position appears to be that she should have been permitted to amend her Complaint. The answer is, this matter rested in the discretion of the District Court, and in any event, as already indicated, the order denying is not an appealable order.

The assignment of error in relation to the Memorandum and Order of May 19, 1958 is again a restatement of Appellant's contention that in the absence of action by the Comptroller she herself has some form of action based on the national banking laws. There appears to be no support to this position and the point has already been covered in the Argument, *supra*.

Appellant's last assignment of error is to the effect that Appellees made their Motion to Dismiss too late. It is fundamental, and requires no citation of authority, that the question as to jurisdiction may be raised at any time.

IV.

Conclusion

Based upon the foregoing it appears that this court should either dismiss this appeal as to Appellee bank or affirm the Memorandum and Order of the District Court of January 28, 1958.

Dated: December 20, 1958.

Respectfully submitted,

SAMUEL B. STEWART

ROBERT T. SHINKLE

Attorneys for Appellee Bank

KENNETH M. JOHNSON,
Of Counsel.

No. 16058 ✓

United States
Court of Appeals
for the Ninth Circuit

SELDEN G. HOOPER,

Appellant,

VS.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Southern Division

FILED

AUG 15 - 1958

PAUL H. GIBBEN, Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court, Southern
District of California, Southern Division

No. 2027-SD-C

SELDON G. HOOPER, Petitioner,
vs.

G. B. H. HALL, Rear Admiral, USN, Commandant, Eleventh Naval District, Respondent.

DISMISSAL OF PETITION

The petitioner having on May 2, 1957, filed a document entitled "In the Matter of the Petition for Writ of Prohibition by Seldon G. Hooper", and it appearing from the Exhibit attached to the petition that the petitioner is presently a retired naval officer entitled to receive retirement pay, the Court now summarily, and over its own motion finds that there is no jurisdiction in the United States District Court, Southern District of California, to grant the relief prayed for by petitioner in the above entitled document and, further, that even if the Court did have jurisdiction that the petition should be denied as no cause of action has been stated in that the military has jurisdiction to try petitioner, and petitioner has not exhausted his legal remedies before military tribunals,

Now Therefore, It Is Ordered that the relief sought in the petition for Writ of Prohibition be

and the same is hereby denied and the Petition is dismissed with leave to file an amended petition.

Dated: May 3, 1957.

/s/ JAMES M. CARTER,
United States District Judge. [11]

[Endorsed]: Filed May 3, 1957. Docketed and Entered May 7, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR WRIT OF
PROHIBITION AND FOR DECLARA-
TORY RELIEF

After leave of the above entitled court to amend his complaint, pursuant to the order of the above entitled court, entered May 3, 1957 in the above entitled matter, petitioner and plaintiff respectively amends his complaint to show as follows:

I.

For purposes of convenience, petitioner and plaintiff will hereinafter be referred to as plaintiff, and respondents and defendants will hereinafter be referred to as defendants.

II.

John Does I to V, inclusive are fictitious names of defendants, whose true names are unknown at this time to [12] plaintiff, and at such time as plaintiff learns the true names of said defendants,

plaintiff will ask leave of the above entitled court to amend this complaint by inserting such true names of defendants in the place of said fictitious names.

III.

Plaintiff is informed and believes and on that basis alleges that defendants John Does I to V, are officers and agents of the United States of America, and in such capacity are charged with the duty to prepare and pay to plaintiff retirement pay as a retired officer of the United States Navy.

IV.

That on or about April 15, 1957, plaintiff was charged by legal officers on active duty in the United States Navy with an offense against the Uniform Code of Military Justice, to wit: Articles 125, 133 and 134, and commanded to appear before a court martial to be convened at Headquarters, Eleventh Naval District, San Diego, California, pursuant to order of G. B. H. Hall, Rear Admiral, USN, Acting Commandant, Eleventh Naval District.

V.

That plaintiff has never been confined nor arrested as the result of said proceedings and therefore the remedy of habeas corpus is not available to plaintiff and he has no other remedies in any courts to correct the illegal acts hereinafter set forth.

VI.

Attached to the original petition filed by plaintiff

in this action as Exhibit "A"* was a true copy of the charge sheet and specifications convening said court martial and purporting to show jurisdiction of the United States Navy over the person of plaintiff, and plaintiff hereby refers to said Exhibit "A" of his original petition, and incorporates the same into this [13] his amended petition and complaint as though herein set forth in full.

VII.

The plaintiff has never been recalled to active duty in the United States Navy for purposes of a court martial, but pursuant to the aforesaid order reported to general headquarters of the Eleventh Naval District Court Martial, on Monday, May 6, 1957, and objected therein to the jurisdiction of said court martial over plaintiff, before any proceedings were had. That the objection of plaintiff was overruled and trial was held on the 6th and 7th of May, 1957 by the Board convened for such purposes, and on May 7th, 1957 the following verdict was returned by said Board:

That plaintiff was not guilty of specification 1, charge 1, that plaintiff was not guilty of specification 2, charge 1, that plaintiff was guilty of specification 3, charge 1, and plaintiff was guilty of charge 1. Specification 4 of charge 1 was dismissed without a finding, prior to the retirement of the Board for verdict.

* [Exhibit A set out at pages 19-23.]

That plaintiff was guilty of specification and charge 2, and guilty of charge 2, that plaintiff was guilty of specification and charge 3 and guilty of charge 3.

As a result of said findings, said Board purported to make an order and sentence that plaintiff be dismissed from the United States Navy and forfeit all retirement pay rights and privileges therein.

VIII.

The jurisdiction of this court on this cause of action is invoked under Section 1651(a) of Title 28, United States Code.

IX.

That your petitioner was formerly in the United States Navy on active duty and was retired with the rank of Rear Admiral therein on December 1, 1948, and since then your plaintiff [14] has not been ordered back to active duty and plaintiff since said date has not been subject to orders of the United States Navy or answerable thereto for his conduct.

X.

The offenses charged against plaintiff were allegedly committed in Coronado, California, as shown in Exhibit "A" heretofore referred to, and said offenses are cognizable under the Penal Code of the State of California, to wit: Section 288 (a) of the California Penal Code, and the attempt of the Commandant of the Eleventh Naval District and the authorities of the United States Navy to hold

plaintiff answerable for said alleged conduct in a court martial is a direct and improper interference with the jurisdiction of the State of California, and a refusal to apply the rules of comity as they exist between the State of California and the United States.

XI.

The Commandant of the Eleventh Naval District, plaintiff is informed and believes, claims jurisdiction of plaintiff's person, pursuant to Article 2 (4) of the Uniform Code of Military Justice, as set out in Title 50, United States Code, Section 552 (4)

XII.

That the findings and sentence of the aforesaid court martial as heretofore set out are not final until approved by reviewing authorities as required by law, and plaintiff believes that this is a proper case for a writ of prohibition to issue against said authorities and against defendants from taking any further action on said findings and sentence, for carrying the same into effect, and that if this court finds that said findings and sentence were illegal as ones returned without jurisdiction to make the same against your plaintiff, that this court in the [15] alternative should issue a writ of mandamus compelling the dismissal by defendants, without action of such findings and sentence, charges and specifications.

XIII.

That plaintiff contends and alleges that Title 50, United States Code, Section 552(4), is unconstitu-

tional and repugnant to the Constitution of the United States and beyond the scope of the authority of the Congress of the United States to pass, in that said statute, insofar as plaintiff is concerned and the offenses allegedly committed by plaintiff are concerned, is an attempt to exercise military court martial jurisdiction over one who is not actively on duty with the armed forces of the United States, and therefore said Section cannot be sustained on the constitutional power of Congress to raise and support armies, declare war or punish offenses against the law of nations, nor can the same be a valid exercise of the power granted Congress in Article I of the Constitution of the United States, to make rules for the government and regulation of the land and naval forces, since plaintiff is not a member of the naval forces subject to such authority and power of Congress, and the purported exercise of said authority by Congress pursuant to said Section claiming jurisdiction over retired military personnel, is an attempt to extend the power of Congress to pass rules and regulations for the government of the land and naval forces of the United States beyond the scope necessary and proper for the governing of the land and naval forces of the United States and the maintaining of proper discipline therein. Further, that the offenses charged and allegedly committed by your plaintiff did not arise in the land and naval forces of the United States within the meaning of the Constitution of the United States, but the alleged offenses, if true, are common law offenses commonly [16]

cognizable in the Civil Court and said offenses as heretofore stated are cognizable in the courts of the State of California and exclusive jurisdiction is vested in said Court of California.

XIV.

That if as plaintiff contends, Title 50, U. S. Code, Section 552(4) is unconstitutional as an attempt to exercise jurisdiction in your plaintiff's case over a person not subject to military and naval law, and over an offense not arising in the land and naval forces of the United States, such court martial proceedings and all matters pertaining thereto so far as plaintiff was concerned, are unconstitutional as a deprivation of plaintiff's right of jury trial on such offenses and charges as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and the Constitution of the State of California, of which plaintiff is a citizen. That unless the defendants are restrained and prohibited by order of this court, plaintiff is informed and believes, they will continue to proceed upon said court martial findings and sentence until the same are final, at which time they will refuse, neglect and fail to pay to plaintiff the retirement pay from the United States Navy to which plaintiff is entitled, all of this in violation of the Constitutional rights of plaintiff as heretofore alleged.

As and For a Second Cause of Action and As Complaint For Declaratory Relief, Plaintiff Alleges:

I.

Plaintiff refers to Paragraphs I, II and III of his first cause of action and incorporates the same as though set out herein in full.

II.

The jurisdiction of this court is invoked under Title 28, Section 1331 and Section 1355, of the United States Code, and [17] relief is prayed for under Title 28, Section 2201 and 2202 of the United States Code. This action is brought to enjoin the enforcement of an order under the general court martial, Eleventh Naval District, United States Navy, San Diego, California, ordering plaintiff dismissed from the United States Navy and forfeiting all rights of his retirement pay from the United States Navy. The action arises under and involves the interpretation of Section 552(4), Title 50, of the United States Code, commonly called the Uniform Code of Military Justice Act, Section 2(4).

III.

Plaintiff was formerly a member of the United States Navy and was retired therefrom on December 1, 1948, with the rank of Rear Admiral, and with the right to draw retirement pay in excess of \$3,000.00 per year for active service faithfully rendered in the United States Navy for the period and under the conditions required by law for retirement with said pay, all of this prior to the commission of the alleged offenses for which plaintiff was tried. Defendant, G. B. H. Hall was and is a Rear Ad-

miral in the United States Navy and Acting Commandant, Eleventh Naval District, who purported under the authority of the United States Code, Section 552(4), to convene a general court martial to try plaintiff as a retired naval officer drawing regular pay, for offenses allegedly committed and set out in Exhibit "A" of the original petition filed herein by plaintiff, Exhibit "A" of which is hereby referred to and incorporated herein as though set out in full. That pursuant to said order and general court martial proceeding by the order of said Board convened by the authority of said defendant, on May 7, 1957, a verdict of guilty was found against your plaintiff and sentence was issued thereon dismissing plaintiff [18] from the United States Navy and forfeiting all right of retirement pay therein.

IV.

If said findings and sentence are finally approved as required by law, plaintiff will have forfeited in excess of \$3,000.00 per year, from the United States, for services performed prior to the date of the commission of the alleged offenses.

V.

That said court martial and said proceedings were over the objection and without the consent of your plaintiff.

VI.

The wrongful conduct of plaintiff as alleged by defendants allegedly occurred more than eight years after retirement of plaintiff from the United States

Navy, and the alleged offenses are cognizable in the courts of the State of California under Section 288(a) of the Penal Code of the State of California, and are not crimes or wrongs arising in the land or naval forces of the United States and are not affected with or by the necessity for maintenance of military discipline in the armed forces of the United States, and did not occur on a military reservation, naval ship, or other property owned by or within the jurisdiction of the United States military authorities, and since said retirement plaintiff has never been recalled to active duty by any authorities of the United States.

The activities allegedly engaged in by plaintiff are, if true, strictly offenses against the sovereignty of the State of California, the right to regulate and punish which is reserved to and reposed in the People of the State of California by the Constitution of the United States. [19]

VII.

Section 552(4) of Title 50 of United States Code, commonly referred to as Section 2(4) of the Uniform Code of Military Justice, is unconstitutional and void for the following reasons:

(A) Said act exceeds powers granted to Congress by the Constitution of the United States for the governing of the land and naval forces of the United States, or for the punishing of offenses or crimes arising therein, in that at the time of the commission of the alleged offenses, plaintiff was not

a member on active duty in the armed forces of the United States and was drawing retirement pay therefrom for services rendered prior to the commission of the alleged offenses.

(B) Such statute deprives plaintiff as a civilian citizen of all personal rights guaranteed in the Constitution of the United States.

(C) Said statute encroaches on the jurisdiction of the Federal Courts of the United States, under Article 3 of the Constitution of the United States, and encroaches on the rights and powers of the States as separate sovereignties reserved to them under the Constitution of the United States.

(D) Said section is void and beyond the scope and power of Congress to make rules for the government and regulation of the land and naval forces insofar as plaintiff is involved, in that plaintiff was not a member of the land and naval forces of the United States at the time of the commission of the aforesaid alleged offenses or at the time of the findings and sentence against plaintiff.

(E) That at the time of the commission of the alleged offenses and at the time of the trial of plaintiff, the courts of the United States and the Civil Courts of the State of California were available for hearing the facts of said alleged [20] offense, and were not closed or inoperative, or suspended, due to insurrection, rebellion or civil disorder.

(F) Said statute unlawfully delegates to the

authorities of the United States Navy and the Defense Department of the United States judicial power and unlimited discretion in determining that people not in the army or navy, or air force, or other military establishment of the United States, are members thereof for purposes of exercising court martial jurisdiction and punishment over said persons.

VIII.

The enforcement of the aforesaid order of the general court martial depriving plaintiff of all of his pay and forfeiting the same to which plaintiff is entitled by law, works an unusual hardship upon plaintiff and irreparable injury and damage for which there exists at law no adequate remedy. That the amount of forfeiture exceeds \$3,000.00 per year and that plaintiff is a male aged 52 years, with a normal life expectancy and is informed and believes and on that basis alleges that the value of the right to receive such pay per year for life is in excess of \$100,000.00, that the forfeiture purportedly and illegally assessed against the plaintiff damaged plaintiff in excess of \$100,000.00. The allowance of approval by convening authorities and reviewing authorities of said sentence and findings and the further enforcement of said sentence for dismissal from the Navy and forfeiture of pay, will in its effect and operation amount to confiscation of the property rights of plaintiff, in violation of the Constitution of the United States, as done without due process of law or without jurisdiction to do the acts complained of herein.

IX.

That a controversy exists between plaintiff and defendants on the constitutionality of Section 552(4) of Title 50 of the [21] United States Code and of the right of defendants to assert jurisdiction over plaintiff or to forfeit plaintiff's retirement pay as earned by law by plaintiff, or refuse to pay the same to plaintiff. Plaintiff alleges that it is a ministerial duty of defendants to make the payments to plaintiff under law as a retired officer of the United States Navy. Further, that a controversy exists between plaintiff and defendants, and that plaintiff asserts that even if Section 552(4) is constitutional to the extent that defendants may exercise jurisdiction over the person of petitioner for the purposes of dismissal from the United States Navy upon a conviction of charges as alleged, they may not forfeit the pay for retirement to which plaintiff is entitled and has earned by right and law for honorable service for the period required by law in the United States Navy prior to commission of the alleged offenses. That thereby upon retirement upon the conditions required by law therefor, plaintiff becomes entitled to said retirement pay for the remainder of his natural life and that said right to said pay is a vested right and property right in plaintiff, which defendants may not deprive plaintiff of under color of law and it is beyond the power of Congress, to deprive plaintiff of, irregardless of acts of plaintiff subsequent to the earnings of said retirement pay as a vested right.

X.

A delay in ascertaining and determining the rights of plaintiff will result in serious loss and damage to plaintiff and will deprive plaintiff of the retirement pay upon which he is dependent for his earnings and upon which others dependent upon plaintiff for their livelihood in turn are dependent. That the rights of plaintiff have been, are now, and will continue to be violated unless plaintiff is protected from the unlawful acts hereinbefore [22] complained of and the continuation of such unlawful acts by defendants purporting to derive authority and jurisdiction from the Uniform Code of Military Justice and rules and regulations promulgated by the President of the United States. The injuries which will inevitably flow from the performance by the defendants and others acting under authority of said acts and laws of the Uniform Code of Military Justice are and will be irreparable unless relief be granted by this Court and plaintiff has no other remedy at law or equity in this or other courts.

Wherefore, plaintiff prays relief as follows:

1. That on the first cause of action, the above entitled court issue its order to G. B. H. Hall, Rear Admiral, USN, ordering him to appear on a date and at a time to be set by the court to show cause why he should not be permanently restrained and prohibited from attempting to exercise any jurisdiction over the person of plaintiff by court martial

proceedings and why he should not order to dissolve and nullify as void any proceedings heretofore had as alleged in the first cause of action herein, and to rescind the findings and sentence of the court martial board entered therein.

2. (a) That on the second cause of action, Title 50, U. S. Code Section 552(4) be declared unconstitutional and void.

(b) That the court restrain defendants from enforcement of the order and sentence entered on the verdict of the court martial heretofore referred to, purporting to deprive and deny to plaintiff retirement pay from the United States Navy, to which he is entitled under the rank held as of the date of retirement therefrom.

(c) That pursuant to Title 28, United States Code, Sections 2282 and 2284, the above entitled court immediately notify the Chief Judge of the Ninth Circuit of the United States [23] Court of Appeals to designate two judges, at least one of whom shall be a circuit judge, to sit with the judge of the above entitled court to determine this action and proceeding under Section 2201 of Title 28 for declaratory relief, to declare unconstitutional an act of Congress.

3. That if findings be in favor of plaintiff, further relief as necessary to protect the rights of plaintiff pursuant to authority of Section 2201 of Title 28 of the United States Code.

4. For costs of suit herein.

/s/ SELDEN G. HOOPER,
Plaintiff.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Plaintiff. [24]

Duly Verified.

[Endorsed]: Filed May 15, 1957.

EXHIBIT "A"

CHARGE SHEET

Place: Headquarters, Eleventh Naval District,
San Diego, California.

Accused: Hooper, Selden G. Service Number:
061172. Grade: Rear Admiral (Retired).

Organization and Armed Force: U. S. Navy (Re-
tired). Now living at 804 Glorietta Boulevard,
Coronado, California, within the Eleventh Naval
District.

Contribution to Family or Quarters Allowance
(MCM. 126h (2)): None. Pay per Month: Basic,
\$376.74. Sea or Foreign Duty, None. Total, \$376.74.

Record of Service

Prior Service: June 2, 1927 to December 1, 1948
(Retired).

Data As To Witnesses

Name of Witness: Braddock, Roscoe K., SN,
USNR. Address: U. S. Naval Receiving Station,

Exhibit "A"—(Continued)

Naval Station, San Diego, California. Witness for Prosecution.

Name of Witness: McDaniels, Michael A., HA, USN. Address: Hospital Corps School, Naval Hospital, San Diego, California. Witness for Prosecution.

Name of Witness: Schmidt, John Peter, PNS, USN. Address: U. S. Naval Receiving Station, Naval Station, San Diego, California. Witness for Prosecution.

Name of Witness: Sykes, Paul. Address: 128 "I" Street, Coronado, California. Witness for Prosecution.

Name of Witness: Strolin, H. R. Address: Office of Naval Intelligence, San Diego, California. Witness for Prosecution.

* * * * *

Charge I: Violation of the Uniform Code of Military Justice, Article 125.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 20 October 1956, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the period beginning on or about 1 November 1956 to

Exhibit "A"—(Continued)

on or about 1 March 1957, exact dates to the relator unknown, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 3: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 8 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 4: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the summer of 1956, exact date to the relator unknown, commit sodomy with Roscoe Kurtz Braddock, seaman, U. S. Navy.

Specification 5: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California in the summer of 1955, exact date to the relator unknown, commit sodomy with Michael Alvin McDaniels, hospital apprentice, U. S. Navy.

Charge II: Violation of the Uniform Code of Military Justice, Article 133.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, in a garage apartment, at the rear of 604 Glorietta Boulevard, Coronado, California, in the summer of 1955, exact date to the relator unknown, entertain at a party male guests, including Roscoe Kurtz Braddock, now seaman, U. S. Navy, Michael Alvin McDaniels, now

Exhibit "A"—(Continued)

hospital apprentice, U. S. Navy, Paul Sykes, a civilian, and Arthur Gooding, a civilian, at which party "strip poker" was played until he, the said Hooper, and the guests were nude, after which he, the said Hooper, and the said Braddock, McDaniels, Sykes and Gooding engaged in acts of sodomy while still nude, to the disgrace of the armed forces.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U. S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude.

Signature of Accuser: Robert A. Dusch.

Typed Name and Grade: Robert A. Dusch, CDR,
U. S. Navy. Organization: U. S. Navy.

Affidavit

Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above-named accuser this 12th

Exhibit "A"—(Continued)

day of April, 1957, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice, and that he either has personal knowledge of or has investigated the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

/s/ G. L. CHRISTIE,
G. L. Christie,
Captain, U. S. Navy,
Assistant Chief of Staff for
Personnel.

15th April 1957

I have this date informed the accused of the charges against him (MCM, 32f(1)).

/s/ G. B. H. HALL,
Commanding,
Rear Admiral, U. S. Navy, Acting Commandant,
11th Naval District.

Headquarters, Eleventh Naval District, San Diego, California, 15 April 1957.

The sworn charges above were received at 1015 hours, this date (MCM, 33b).

/s/ G. B. H. HALL,
Rear Admiral G. B. H. Hall, USN, Acting Com-
mandant, 11th Naval District.

* * * * *

[Endorsed]: Filed May 2, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Plaintiff and His Attorneys, Hillyer and
Crake, Esq., Please Take Notice:

That the Defendant, G. B. H. Hall will bring on
for hearing the within Motion to Dismiss and for
Summary Judgment on Monday, September 9, 1957,
at 10:00 A.M., before the Honorable James M.
Carter, United States District Judge, at the United
States Courthouse, San Diego, California.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,

Attorneys for Defendant,
G. B. H. Hall. [29]

[Endorsed]: Filed August 13, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT

The Defendant, G. B. H. Hall moves the Court that this suit be dismissed under the provisions of Rule 12, Federal Rules of Civil Procedure, or in the alternative, for Summary Judgment of dismissal of this suit under the provisions of Rules 12 and 56, Federal Rules of Civil Procedure, upon each and all of the following grounds:

I.

That the Defendant, G. B. H. Hall, is not the Commandant of the Eleventh Naval District, having only been acting Commandant for a short period, C. C. Hartman, Rear Admiral, U. S. Navy, having succeeded to that office after a temporary absence, and the Plaintiff as yet not having moved to substitute C. C. Hartman in place of G. B. H. Hall as Defendant in the manner required by Rule 25(d), Federal Rules of Civil Procedure, this suit has abated as a matter of law; [30]

II.

That this Court has no jurisdiction of the subject matter of the suit.

That this suit, being one for Declaratory Judgment and injunction, necessarily raises issues concerning the jurisdiction of courts-martial and the effect of a sentence thereof which are in this suit

wholly outside the subject matter jurisdiction of this Court;

III.

That insofar as this suit involves the issue of the dismissal of an officer from the Armed Forces of the United States, it purports to review an action wholly within the power of the President and the Executive Branch of the government and wholly outside the subject matter jurisdiction of this Court;

IV.

That the Secretary of the Navy, not having been named or served as a Defendant in this suit, the Plaintiff has failed to join an indispensable party;

V.

That the Commandant of the Eleventh Naval District, having no power, authority or discretion over any of the subject matter as to which Plaintiff prays relief, this suit fails to state a claim upon which relief can be granted;

VI.

That the Plaintiff having yet failed to exhaust the remedies available to him in the court-martial appellate review procedures, this suit fails to state a claim upon which relief can be granted.

The following documents in support of this motion are submitted: [31]

Affidavit of C. C. Hartman, attached hereto as Exhibit No. 1.

Affidavit of Luis V. Castro, attached hereto as Exhibit No. 2.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendant,
G. B. H. Hall. [32]

EXHIBIT No. 1

AFFIDAVIT

United States of America,
Southern District of California—ss.

I, Rear Admiral C. C. Hartman, United States Navy, having been duly sworn, do state as follows:

1. I am and have been on all the dates stated in this affidavit, Commandant of the Eleventh Naval District of the United States Navy at San Diego, California, except that Rear Admiral G. B. H. Hall was Acting Commandant during my temporary absence.

2. I am and on all the dates stated in this Affidavit have continued to be authorized to convene general courts-martial under Article 22, Uniform

Exhibit No. 1—(Continued)

Code of Military Justice, and the Acting Commandant is and was likewise so authorized in my absence.

3. On April 15, 1957, there were received at my Headquarters sworn charges, against Rear Admiral Selden G. Hooper, United States Navy, Retired, alleging violations of Articles 125, 133 and 134, Uniform Code of Military Justice, a copy of which is attached hereto as Exhibit A.

4. On the same date, April 15, 1957, the Chief of Staff, Eleventh Naval District, in my absence, appointed an investigating officer to conduct a pretrial investigation under the provisions of Article 32, Uniform Code of Military Justice. The investigating officer thereafter returned his report to me including therein a recommendation that the charges against Rear Admiral Hooper be tried by general court-martial.

5. These charges were referred for trial by general court-martial by my order, endorsed thereon, dated April 24, 1957. On April 29, 1957, by my order of that date, copy of which is attached hereto as Exhibit B, I appointed a general court-martial, composed of officers of sufficient rank, as required by Article 25d, Uniform Code of Military Justice, for trial of these charges, incorporating therein the reference for trial previously made on April 24, 1957. Rear Admiral Hooper was arraigned and

Exhibit No. 1—(Continued)

tried on May 6 and 7, 1957, at San Diego, California, before that General Court-Martial. [33]

6. On May 27, 1957, the District Legal Officer of the Eleventh Naval District, submitted to me the record of trial of the General Court-Martial of Rear Admiral Hooper together with his review containing his written opinion thereon, pursuant to Article 61, Uniform Code of Military Justice. On the same date I took action on the record in writing in accordance with the recommendation of the District Legal Officer, pursuant to Articles 60, 64 and 65a, Uniform Code of Military Justice. On the same date, I directed publication of General Court-Martial Order No. 90-57, Eleventh Naval District Headquarters (publishing therein the results of trial including my action on the case), pursuant to paragraph 90, Manual for Courts-Martial, United States, 1951, a copy of which is attached hereto as Exhibit C.

7. Pursuant to Article 65a, Uniform Code of Military Justice, and paragraph 91, Manual for Courts-Martial, United States, 1951, the record of trial was on the same date transmitted by United States mail to the Office of the Judge Advocate General, United States Navy.

8. From that date to the date of this affidavit, neither said General Court-Martial case, nor the record of trial therein have been remanded to me, nor have I received from the Judge Advocate Gen-

Exhibit No. 1—(Continued)

eral, or any other superior authority any authorization or direction to take any further action of any kind with respect to that case.

/s/ C. C. HARTMAN.

Subscribed and sworn to before me this 31st day of July, 1957.

/s/ EDA D. MANDICH,

Notary Public in and for the County of San Diego,
State of California. My Commission Expires
January 27, 1959.

EXHIBIT 1-B

(Copy)

22, A17-1, Ser 273/22

Commandant
Eleventh Naval District
937 N. Harbor Drive
San Diego 30, California

29 Apr 1957

From: Commandant, Eleventh Naval District.

To: Rear Admiral Robert L. Campbell, U. S. Navy,
President, General Court-Martial, Eleventh
Naval District, U. S. Naval Station, San Diego,
California.

Sub: Appointing general court martial.

Pursuant to authority contained in Section 0102 in the 1955 Naval Supplement to the Manual for Courts-Martial, United States, 1951, a general court-martial is hereby ordered to convene at the

Exhibit 1-B—(Continued)

U. S. Naval Station, San Diego, California, at 0900 hours on 6 May 1957, or as soon thereafter as practicable for the trial of Rear Admiral Seldon G. Hooper, U. S. Navy, Retired, only, whose unarraigned case is now in the hands of the Trial Counsel of the General Court-Martial convened by my appointing order serial 198/22 dated 28 March 1957. The court will be constituted as follows:

Law Officer: Commander Benjamin J. Jacobs, U. S. Navy, certified in accordance with Article 26a. Commander Daniel Flynn, U. S. Navy, certified in accordance with Article 26a; either of whom is empowered to act as such.

Members: Rear Admiral Robert L. Campbell, U. S. Navy, Rear Admiral Walter W. Honaker, SC, U. S. Navy, Brigadier General Russell N. Jordahl, U. S. Marine Corps, Rear Admiral Frederick C. Stelter, Junior, U. S. Navy, Rear Admiral William M. Nation, U. S. Navy, Rear Admiral Ralph K. James, U. S. Navy.

Counsel: Lieutenant Commander Robert E. Conway, U. S. Naval Reserve, Trial Counsel, certified in accordance with Article 27b. Lieutenant Lawrence E. Phillips, U. S. Navy, Trial Counsel, certified in accordance with Article 27b. Lieutenant (junior grade) Sam M. Prochaska, U. S. Naval Reserve, Defense Counsel, certified in accordance with Article 27b.

EXHIBIT 1-C

DF:ac

Eleventh Naval District Headquarters

27 May 1957

General Court-Martial Order No. 90-57

Before a General Court-Martial, which convened at the U. S. Naval Station, San Diego, California, pursuant to my appointing order 22 A17-1 Serial 273/22, dated 29 April 1957, was arraigned and tried Rear Admiral Selden G. Hooper, U. S. Navy (Retired), 061172.

Charge I: Violation of the Uniform Code of Military Justice, Article 125.

Specification 1: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 20 October 1956, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 2: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, during the period beginning on or about 1 December 1956 commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Specification 3: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 8 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U. S. Navy.

Exhibit 1-C—(Continued)

Specification 4: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 1 September 1957, commit sodomy with Roscoe Kurtz Braddock, seaman, U. S. Navy.

Charge II: Violation of the Uniform Code of Military Justice, Article 133.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces.

Charge III: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seldon G. Hooper, Rear Admiral, U. S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U. S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude.

Pleas

To Specifications 1, 2, and 3 of Charge I: Not Guilty.

To Specification 4 of Charge I: Motion to Dismiss Granted.

Exhibit 1-C—(Continued)

To Charge I: Not Guilty.

To the Specification of Charge II and Charge II:
Not Guilty.

To the Specification of Charge III and Charge
III: Not Guilty.

Findings

Of Specifications 1 and 2 of Charge I: Not
Guilty.

Of Specification 3 of Charge I: Guilty.

Of Specification 4 of Charge I: Motion to Dis-
miss Granted.

Of Charge I: Guilty.

Of the Specification of Charge II and Charge II:
Guilty.

Of the Specification of Charge III and Charge
III: Guilty.

Sentence

To be dismissed from the service and to forfeit
all pay and allowances. (No previous convictions
considered.)

The sentence was adjudged on 7 May 1957.

Action

“Commandant’s Office
Eleventh Naval District
San Diego, California

In the foregoing case of Rear Admiral Selden
G. Hooper, U. S. Navy, Retired, the sentence is
approved.

The record of trial is forwarded to the Judge

Exhibit 1-C—(Continued)

Advocate General of the Navy for review by a Board of Review.

C. C. HARTMAN,

Rear Admiral, U. S. Navy,

Commandant, Eleventh Naval District, San Diego,
California.”

C. C. HARTMAN,

Rear Admiral, U. S. Navy,

Commandant, Eleventh Naval District, San Diego,
California.

/s/ R. L. LIBBY,

Captain, U. S. Navy,

District Legal Officer, By Direction.

[Endorsed]: Filed August 13, 1957.

[Title of District Court and Cause.]

EXHIBIT No. 3

AFFIDAVIT

Commonwealth of Virginia,
County of Arlington, to wit—ss.

This day before me, Homer A. Walkup, a legal officer of the Bureau of Naval Personnel, authorized to administer oaths and to act as a notary public by Article 136, Uniform Code of Military Justice, Title 10, U. S. Code, Section 936, personally appeared in the County and Commonwealth afore-

Exhibit No. 3—(Continued)

said, Vice Admiral J. L. Holloway, Jr., U. S. Navy, who, being duly sworn, deposes and says:

1. That he is Chief of Naval Personnel, Department of the Navy, Department of Defense, United States of America.

2. That in his capacity as Chief of Naval Personnel, he is responsible to the Secretary of the Navy for, inter alia, procurement, distribution, training, discipline, discharge, retirement, and maintenance of records, with respect to personnel of the United States Navy and the United States Naval Reserve.

3. That he maintains, in the ordinary course of official business, in his official custody, and under his official supervision, the records relating to the service and performance of Selden G. Hooper, Rear Admiral, U. S. Navy, retired, file number 61172.

4. That entries made in the ordinary course of official business in records maintained by the affiant as aforesaid, relating to the said Selden G. Hooper, indicate that the said Selden G. Hooper, from a period before 1 January 1955 up to and including the present time, has been in the status of a retired officer not on active duty, and has maintained his residence in the city of Coronado, California; that official mail addressed from the Department of the Navy to the said Hooper while he has been in the status and maintaining the residence aforesaid has been sent via the Commandant of the Eleventh Naval District, San Diego, California; and that, under date of 12 April 1957, there were preferred against the said Hooper certain charges of viola-

Exhibit No. 3—(Continued)

tions of the Uniform Code of Military Justice, upon which he was tried before a general court-martial convened by the Commandant of the Eleventh Naval District on 6 and 7 May 1957.

5. That the pay of retired naval personnel not on active duty is disbursed by the Navy Finance Center in Cleveland, Ohio, an activity maintained under the supervision of the Comptroller of the Navy and the Assistant Secretary of the Navy (Financial Management).

6. That as regards other relationships between the naval service and retired officers not on active duty, both the office held by the affiant and those of the Commandants of the Naval Districts in which such officers maintain their homes have areas of responsibility. In areas wherein the affiant deals with such officers, he ordinarily does so through the intermediacy of Naval District Commandants; in areas wherein Commandants deal with such officers, the affiant is usually informed by being furnished copies of correspondence. That examples of such dealings by the affiant with retired officers not on active duty, which examples are not all inclusive, are the following:

a. Determines, in accordance with applicable provisions of law, when the needs of the naval service require ordering retired officers to active duty, and issues or causes to be issued on behalf of the Secretary of the Navy appropriate orders to the retired officers concerned.

Exhibit No. 3—(Continued)

b. Furnishes verification of status and service to the Navy Finance Center in Cleveland, Ohio, in order that appropriate action can be taken by that office to initiate and continue retired pay to the retired officers concerned in the proper amounts.

c. Maintains or causes to be maintained at the Bureau of Naval Personnel in Washington, D. C. each retired officer's individual record of service, which record covers all of that officer's service in the Navy, including all periods of active duty, periods while in a retired status, and periods of active duty while in a retired status.

d. Considers cases wherein retired officers are convicted of commission of felony by civil authorities, and in proper cases makes recommendations to the Secretary of the Navy for his further consideration and recommendation to the President, in connection with dropping the officer concerned from the rolls.

e. Calls to the attention of the retired officer concerned complaints relative to his failure to pay just debts, failure to furnish adequate support to dependents, or other conduct tending to bring discredit upon the Navy, and determines what further action is required with respect to such alleged conduct, if any.

7. That court-martial proceedings against retired officers not on active duty represent an area wherein Naval District Commandants are responsi-

Exhibit No. 3—(Continued)

ble for initiating and conducting such proceedings through all stages prior to review by a board of review in the office of the Judge Advocate General of the Navy.

8. That the affiant notes from the style of the captioned litigation that the respondent, Rear Admiral G. B. N. Hall, U. S. Navy, has been described as the Commandant, Eleventh Naval District; that records maintained in the ordinary course of official business, in the official custody and under the official supervision of the affiant, indicate that the said Rear Admiral G. B. N. Hall is not the Commandant of the Eleventh Naval District, but is the Commander, Naval Air Bases, Eleventh and Twelfth Naval Districts, having reported to that position on 18 January 1957, pursuant to orders of the affiant under date of 31 August 1956; that official records maintained as aforesaid indicate that the Commandant of the Eleventh Naval District is Rear Admiral C. C. Hartman, U. S. Navy, who reported as Commandant on 31 January 1955, pursuant to orders of the affiant under date of 1 November 1954.

Further, the affiant saith not.

Given under my hand this 3rd day of August 1957.

/s/ JAMES L. HOLLOWAY, JR.

Taken, sworn to, and subscribed before me this 3rd day of August 1957.

/s/ HOMER A. WALKUP,

Commander, USNR, Legal Officer.

EXHIBIT No. 4

Commandant's Office
Eleventh Naval District
San Diego 30, California

Address Reply to Commandant, 11th Naval District and refer to: P19-2, ND11/010(NR)dd, Serial 340/010(NR).

12 July 1948

From: Captain Selden G. Hooper, USN, 61172.

To: The Secretary of the Navy.

Via: (1) The Commandant, Eleventh Naval District. (2) The Chief of Naval Personnel.

Subject: Voluntary retirement, request for.

1. Having completed twenty-one years commissioned service in the United States Navy on 2 June 1948, it is requested that I be transferred to the retired list of officers of the Navy, effective 1 December 1948.

2. This request for retirement is predicated, in part, upon my understanding that I am eligible to receive the retirement benefits prescribed for an officer who has been specially commended for performance of duty in active combat. If this be not so, this request is cancelled.

/s/ S. G. HOOPER,
S. G. Hooper.

[Pen Note: He is eligible.—(Illegible)]

Exhibit No. 4—(Continued)

61172

Pers-325-TRD/lib

8 December 1948

From: Secretary of the Navy.

To: Rear Admiral Selden G. Hooper, USN, Retired, 604 Glorietta Boulevard, Coronado, California.

Subj: Transfer to the Retired List.

1. Your request to be transferred to the retired list was approved by the President of the United States, effective 1 December 1948.

2. Having been specially commended by the head of the executive department for your performance of duty in actual combat, you were on 1 December 1948 transferred to the retired list with the rank of Rear Admiral but with the retired pay based on the rank of Captain in accordance with the provisions of U. S. Code, Title 34, sections 410b and 410n.

3. Please furnish the Disbursing Officer having custody of your pay record four certified copies of this letter.

4. Please acknowledge receipt to the Chief of Naval Personnel.

5. During the time you have so faithfully and efficiently served, you have witnessed many advancements in the morale, strength and efficiency of the Navy; and you have the satisfaction of knowing

Exhibit No. 4—(Continued)

that you have contributed materially to the accomplishment of these results. I regret your retirement from active service and take this occasion to extend to you my heartiest congratulations and appreciation for your long and distinguished service to our Nation. May I wish you continued success and many years of health and happiness.

M. E. ANDREWS,

Acting Secretary of the Navy.

Prepared by Commander T. B. Dabney, USN,
BuPers 325, Extension 71116.

CC: Pers-321, Pers-1B, Pers-32152, Pers-327, Pers-311, Pers-8311, Pers-8232, Pers-82231, Pers-311s4, BuS&A (Spec. Pay. Div., Cleveland, Ohio), Office copy, Jacket copy.

13 December 1948

From: Selden G. Hooper, Rear Adm. USN (ret.).

To: Chief of the Bureau of Naval Personnel.

Subject: Letter of transfer to Retired List USN,
receipt of.

Ref: (d) Secnav Ltr file No. 61172, Pers. 325-TBD/
lib, dated 8 Dec. 1948 to Selden G. Hooper.

1. In accordance with par. 4 of the ref., receipt is hereby acknowledged of the ref.

/s/ SELDEN G. HOOPER.

Exhibit No. 4—(Continued)

Rear Admiral Selden Gain Hooper, U. S. Navy,
61172, Retired

Transcript of Naval Service

25 Dec. 1904—Born in Chicago, Illinois.

6 Jul. 1923—Midshipman, U. S. Navy.

2 Jun. 1927—Ensign, U. S. Navy.

7 Aug. 1947—Commander, U. S. Navy to rank
from 22 June 1938.

19 Apr. 1945—Captain for temporary service.

1 Dec. 1948—Placed on the Retired List with the
rank of Rear Admiral.

Ships and Stations

U. S. Naval Academy, Annapolis, Md., from Jun.
1927 to Aug. 1927.

USS New Mexico (dufly) from Sep. 1927 to May
1930.

Submarine Base, New London, Conn., from Jul.
1930 to Dec. 1930.

Submarine Division Nineteen, from Feb. 1931 to
Sep. 1932.

USS Fulton, from Sep. 1932 to Mar. 1933.

USS Palos, from Apr. 1932 to Sep. 1934.

USS Canopus, from Sep. 1934 to Feb. 1935.

U. S. Naval Academy, Annapolis, Md. (Instruc-
tion), from May 1935 to May 1936.

USS Eagle (CO), from Jun. 1936 to Jun. 1936.

Exhibit No. 4—(Continued)

Third Naval District, from Jun. 1936 to May 1937.

USS Borie (Executive Officer) (CO), from Jun. 1937 to Sep. 1940.

NROTC Unit, Marquette University, Milwaukee, Wisconsin, from Oct. 1940 to Dec. 1941.

USS Richmond, from Jan. 1942 to Jun. 1943.

Bureau of Naval Personnel, from Jun. 1943 to Aug. 1943.

Naval Training Station, Naval Operating Base, Norfolk, Va., from Sep. 1943 to Oct. 1943.

USS Uhlmann (CO), from Nov. 1943 to Mar. 1945.

Destroyer Division Forty-Four, from Mar. 1945 to Jan. 1946.

Eleventh Naval District (Dir. Naval Reserve), from Feb. 1946 to Nov. 1948.

Schools attended prior to entering U. S. Naval Academy: Palo Alto High, Columbian Preparatory.

Wife: Not married.

Children: None.

Mother: Resa Hooper.

Father: Not of record.

Home address: 604 Glorietta Boulevard, Coronado 18, California.

EXHIBIT No. 5

Prep. 9/19/49.

Pers-329-RT, 061172

From: The Chief of Naval Personnel.

To: Rear Admiral Selden G. Hooper, U.S.N. (ret.),
604 Glorietta Blvd., Coronado, Calif.

Subj: Uniform; wearing of.

Ref: (a) Your letter dated 8 September 1949.

1. Permission is hereby granted you to wear your naval uniform on appropriate occasions while employed as Superintendent of the West Coast Naval Academy.

2. It is the policy of the Navy Department to permit retired and Reserve officers to wear their naval uniforms on appropriate occasions when engaged in the instruction of a cadet corps or similar organization at naval or military academies or other institutions of learning. It would be permissible, therefore, for other retired and Naval Reserve officers employed by the West Coast Naval Academy to wear their naval uniforms in connection with such duties.

[Endorsed]: Filed August 21, 1957.

EXHIBIT No. 6-A

United States of America

Department of the Army

Washington, 25 October, 1957

I Hereby Certify that the official records in the custody of The Adjutant General of the Army show that as of 30 September 1957 there were 58,453 retired personnel of the Regular Army who are entitled to receive pay.

I Further Certify that no statistics are available relative to the number of retired reserve personnel receiving hospitalization from an Armed Force.

/s/ HERBERT M. JONES,
Herbert M. Jones,
Major General, USA,
The Adjutant General.

I Hereby Certify that Major General Herbert M. Jones, who signed the foregoing certificate, is The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Wilber M. Brucker, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at

Exhibit No. 6-A—(Continued)

the City of Washington, this 25th day of October, 1957.

[Seal] /s/ WILBER M. BRUCKER,
 Secretary of the Army,
/s/ By JAMES E. COOK,
 Deputy Administrative
 Assistant. [100]

EXHIBIT No. 6-B

CERTIFICATE

This Is To Certify that the records of the Office of Personnel, United States Coast Guard Headquarters, Washington, D. C., indicate that as of 1 September 1957 there were 8019 retired persons of the regular component of the U. S. Coast Guard who were entitled to receive pay.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States Coast Guard to be affixed this 24th day of September, 1957.

[Seal] /s/ ALLEN WINBECK,
 Allen Winbeck,
 Rear Admiral, USCG,
 Chief, Office of Personnel,
 U. S. Coast Guard.

This Is To Certify that Rear Admiral Winbeck, U. S. Coast Guard, to me known to be the person

Exhibit No. 6-B—(Continued)

described in and who executed the above certificate is the Chief, Office of Personnel, U. S. Coast Guard.

/s/ KENNETH S. HARRISON,
Chief Counsel,
U. S. Coast Guard. [101]

EXHIBIT No. 6-C

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

In reply refer to Pers-A232-pms

October 3, 1957

From: Chief of Naval Personnel.

To: Judge Advocate General.

Subj: Certified statement regarding personnel of the Armed Forces subject to the Uniform Code of Military Justice; request for.

Ref: (a) JAG ltr JAG:142:hjs ser 107869 of 20 Sep 1957.

1. As requested in reference (a) the following information is furnished:

As of 30 June 1957

Retired	22,463 ¹	33,562
Fleet Reserve		20,871 ²

¹ Includes 76 Retired officers on Active Duty.

² Includes 234 Fleet Reservists on Active Duty.

Exhibit No. 6-C—(Continued)

2. Information concerning the number of Retired Reservists receiving hospitalization from an armed force is not available.

/s/ F. C. RYDEEN,

F. C. Rydeen,

By direction.

EXHIBIT No. 6-D

Department of the Navy
Headquarters United States Marine Corps
Washington 25, D. C.

2 October 1957

In reply refer to DGK-7-efs

To Whom It May Concern:

This is to certify that the present numerical strength of the Marine Corps in the categories of personnel specified in subsections 4 and 6 of Article 2, Uniform Code of Military Justice as of 31 July 1957, is as follows:

Subsection 4: Retired personnel of a regular component of the armed forces who are entitled to receive pay:

Officers 2960

Enlisted 6542

Subsection 6: Members of the Fleet Reserve and Fleet Marine Corps Reserve: 1782.

The numerical strength under subsection 5, Retired personnel of a reserve component who are receiving hospitalization from an armed force, is

Exhibit No. 6-D—(Continued)

not available at this Headquarters or at Bureau of Medicine and Surgery, Department of the Navy.

/s/ C. A. RIGAUD,

C. A. Rigaud,

Head, Records Branch.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 19, 1957.

EXHIBIT No. 6-E

United States of America
Department of the Air Force
Washington 25, D. C.

18 December, 1957

I Hereby Certify that I am the Deputy Chief of Military Personnel Records Division, Directorate of Administrative Services, Headquarters United States Air Force; that as such I have official and legal custody of personnel records of retired Air Force members; that the records of the Department of the Air Force show approximately 17,506 retired personnel of the regular component who are entitled to receive pay and approximately 10,176 retired personnel of a non-regular component who are entitled to receive hospitalization from an armed force.

/s/ EUGENE M. MORIARTY,

Eugene M. Moriarty,

Deputy Chief,

Directorate of Administrative
Services.

Exhibit No. 6-E—(Continued)

I hereby Certify that Eugene M. Moriarty, who signed the foregoing certificate, is the Deputy Chief of Military Personnel Records Division, Directorate of Administrative Services, and that to his certification as such, full faith and credit are and ought to be given.

In Testimony Whereof I, James H. Douglas, Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the city of Washington, this 18th day of December, 1957.

[Seal] /s/ JAMES H. DOUGLAS,

Secretary of the Air Force,

/s/ By PHILIP J. CUNAN,

Administrative Assistant. [105]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause.]

STIPULATION AND ORDER

1. As to defendants "John Does I to V inclusive", named in the Amended Complaint on file herein, this suit shall be dismissed.

2. The motion entitled "Motion to Dismiss and for Summary Judgment" filed herein by the former

defendant G. B. H. Hall shall be deemed filed, nunc pro tunc, in behalf of defendant C. C. Hartman as of the date said motion was originally filed in behalf of said defendant Hall.

3. All memoranda, documents or other papers filed in behalf of defendant, G. B. H. Hall shall be deemed to have been filed nunc pro tunc as of the dates of their original filing in behalf of defendant, C. C. Hartman.

4. The motion of plaintiff dated August 30, 1957 brought on for hearing September 9, 1957 entitled "Motion by plaintiff to Substitute Successor in Public Office as Defendant and to Add [108] Additional Defendants," to the extent that it moved for addition of Charles Hunsicker, Jr., J. W. Hendry and Gerald V. Reynolds as additional defendants herein, shall, to that extent only, be withdrawn.

5. This Stipulation shall be received and ordered filed, and the following facts are admitted, and may be considered by the Court:

(a) The court-martial case of Rear Admiral Hooper, the plaintiff herein, was reviewed by the Board of Review, Office of the Judge Advocate General, U. S. Navy, West Coast, at San Bruno, California, and the Board of Review, after briefs and argument, announced, on September 10, 1957, its opinion and decision affirming the conviction and sentence.

(b) The court-martial case was thereafter transmitted to the United States Court of Military Appeals, Washington, D. C. for further review and is

presently docketed before that Court as United States v. Hooper, No. 11,113, in which, appellant Hooper's Opening Brief has just been filed.

Dated: This 25th day of March, 1958.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendant,
C. C. Hartman.

It Is So Ordered: This 27th day of March, 1958.

/s/ JAMES M. CARTER,
United States District Judge.

JAD:bsh [109]

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

MEMORANDUM

A motion to substitute C. C. Hartman, Rear Admiral USN, in place of G. B. H. Hall, Rear Admiral USN, has been granted.

By stipulation the parties have agreed that the motion for summary judgment heretofore made in behalf of Hall may be considered to be the motion in behalf of Hartman.

The amended complaint is entitled "Amended Complaint for Writ of Prohibition and for Declaratory Relief." It is in two counts. Count 1 invokes jurisdiction under Sec. 1651(a), Title 28 U.S.C.A. Count 2 invokes jurisdiction under Sections 1331 and 1355 and under Sections 2201 and 2202, all in 28 U.S.C.A.

Count 1

The prayer of the first cause is for an order to Hall (now Hartman) to show cause as to why "he should not be permanently restrained and prohibited from attempting to exercise any jurisdiction over the person of plaintiff by court martial proceedings, and why he should not order [110] (apparently "be ordered") to dissolve and nullify as void any proceedings heretofore had (the court martial) and to rescind the findings and sentence of the court martial board entered therein."

Thus, plaintiff in Count 1 may be seeking prohibition and/or injunction. There are no allegations in Count 1 as to plaintiff's salary or the amount in

controversy. There is no attempt to state a cause within Sec. 1331, Title 28 U.S.C.A., as a matter in controversy exceeding the sum of \$3000 and arising under the constitution, laws or treaties of the United States. No diversity of citizenship or any other jurisdictional basis for the cause is alleged, except as stated.

Hartman's motion to dismiss is granted as to Count 1.

(a) If for injunction no jurisdictional basis is alleged;

(b) If for prohibition, Sec. 1651(a) refers to writs necessary or appropriate in aid of a court's jurisdiction and agreeable to the usages and principles of law. There is alleged no matter, in respect to which this district court's jurisdiction might be aided or protected.

Count 2

Count 2 alleges plaintiff's pay to be in excess of \$3000 per year and that with his life expectancy, future pay would exceed \$100,000.00. It contends, Art. 2(4) of the Code of Military Justice, Sec. 552(4) of Title 50, U.S.C.A., is unconstitutional. The count therefore rests jurisdiction under Sec. 1331, Title 28 U.S.C.A.

Sec. 1355, Title 28 U.S.C.A., is inapplicable and adds nothing.

Sections 2201 and 2202, Title 28 U.S.C.A., only provide an additional remedy, declaratory relief, if jurisdiction otherwise exists. [111]

The bare essentials of federal jurisdiction would

appear to exist if it were not for the contents of the cause and the matters presented.

The prayer of Count 2 asks, (a) that Art. 2(4) be declared unconstitutional, (b) that the court restrain the defendants from enforcing the order and sentence of the court-martial, (c) that the court convene a three judge court and (d) further general relief under Sec. 2201, Title 28 U.S.C.A.

Although not without doubt, we think that the federal jurisdiction exists and that plaintiff has failed to state a claim for relief. That jurisdiction rests on the federal question of the constitutionality of Art. 2(4) and §3000. Defendants Motion for Summary Judgment is well taken.

(a) This is not a habeas corpus proceeding.

For this court to set itself up to review courts-martials in view of the new Code of Military Justice and the Boards of Review and the Court of Military Appeals, would certainly be improper. We do not propose to do so.

(b) Nor have we power to review dismissals from the Armed Forces of the United States.

(c) Plaintiff has failed to join the Secretary of the Navy, an indispensable party. Clearly, the court-martial [112] is now out of Hartman's hands and before the United States Court of Military Appeals. No relief granted as to Hartman can have any effect on the court-martial proceedings. Since the relief asked for is equitable in character, any order of this court would speak or expend itself as of the date of a decree and not as of the filing of the original complaint on May 2, 1957.

(d) Plaintiff has a clear set of remedies, through the Boards of Review, to the Court of Military Appeals. He is in fact now pursuing them. He has not exhausted these remedies.

Although these remedies exist by federal statute, they also include a court system. The matter is closely analagous to the rule requiring exhaustion of remedies under state statute, through the state courts.

(e) The statute under attack is over 100 years old. It has merely been recopied into the Code of Military Justice. We think it clearly constitutional. The plaintiff was a retired officer, drawing pay, entitled to wear a uniform and subject to recall to active duty. His was no distant or illusory contact with the Navy.

The Three Judge Court

Sec. 2282, Title 28 U.S.C.A., states, "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States, shall not be granted, * * * unless the application therefor is heard and determined" by a three judge court.

Sec. 2284, Title U.S.C.A., states, "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges * * * the procedure of the court * * * shall be as follows * * *". [113]

There follows the subdivision (5) which plaintiff

contends prevents this court from dismissing or granting a summary judgment without assembling a three judge court. Obviously the restrictions in Sec. 2284(5) apply only to those cases required to be heard and determined by a three judge court. Sec. 2282 says an injunction etc., may not be granted. There is no prohibition against dismissal of summary judgment for a defendant by a single judge.

The contention of plaintiff that a statute of Congress over 100 years old, is unconstitutional, and his arguments and briefs thereon, does not necessarily raise a substantial federal question. See *Calif. Water Service Co. v. Redding* [1938] 304 U.S. 252. He has the task of convincing the single judge that a substantial question of unconstitutionality, is presented.

A single district judge, if convinced that no substantial question of constitutionality is raised, may dismiss the proceedings without the "burden, * * * expense and delay" (*Calif. Water Service case, supra, p. 255*) of applying to the Chief Judge of the Circuit to convene the three judge court. *Wicks v. So. Pacific Co.* [9 Cir. 1956] 231 F.2d 130. *Acret v. Harwood* [D.C. Co. Calif.] 41 Fed. Supp. 492, 495.

Defendant will prepare, serve and lodge findings of fact, conclusions of law and judgment, as to Count No. 2, a dismissal of Count No. 1 and in a single document within the time provided by the Rules.

Dated: March 28, 1958.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed March 28, 1958. Amended
April 11, 1958. [114]

United States District Court, Southern District
of California, Southern Division

No. 2027-SD-C

SELDEN G. HOOPER,

Plaintiff,

vs.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Plaintiff, by Oscar F. Irwin, Esq., filed his Amended Complaint herein containing two Causes of Action, praying in the First Cause of Action for a Writ of prohibition and for mandatory and prohibitive injunctive relief and in the Second Cause of Action for the convening of a District Court of three judges, for injunctive relief and for a Declaratory Judgment.

Defendant, C. C. Hartman, appearing by the United States Attorney by Jordan A. Dreifus, Assistant United States Attorney filed a Motion to Dismiss and/or, in the alternative, for Summary

Judgment, and plaintiff opposed said Motion. The Court having heard the arguments of counsel and having considered the memoranda and evidence filed herein, and having heard further argument in settlement of the Form of Findings, Conclusions and Judgment, and having directed that Findings of Fact, Conclusions of Law and Judgment be [134] entered, dismissing the First Cause of Action, and granting Summary Judgment for defendant on the Second Cause of Action, the Court being duly advised in the premises, now makes and enters its Findings of Fact, Conclusions of Law and Judgment as follows:

Findings of Fact

1.

Defendant, C. C. Hartman, is Commandant of the Eleventh Naval District, United States Navy, with headquarters at San Diego, California. Defendant Hartman made his appearance in this case for himself and for no other person. Neither the Secretary of the Navy nor any other person officially superior to defendant Hartman has been joined in this suit or served with the process of the Court herein, The office of the Secretary of the Navy is in Washington, D. C.

2.

Plaintiff Selden G. Hooper graduated from the United States Naval Academy, Annapolis, Maryland, and was appointed and entered upon active duty as a commissioned officer of the regular com-

ponent of the United States Navy with the rank of Ensign, United States Navy, on June 2, 1927.

3.

Plaintiff was in the status of Commissioned Officer of the regular component of the United States Navy, in active naval service, serving on various ships and stations and being promoted from time to time, from June 2, 1927 until December 1, 1948.

4.

Plaintiff on July 12, 1948, applied to the Secretary of the Navy, requesting that he be transferred to the retired list of officers of the Navy and thereby be voluntarily retired, effective December 1, 1948. [135]

5.

Plaintiff's requested retirement was granted, and pursuant thereto, plaintiff was transferred to the retired list of officers of the Navy, effective December 1, 1948, plaintiff being given the rank of Rear Admiral, and plaintiff thereafter receiving the retired pay of the naval rank of Captain.

6.

Plaintiff has at all times and without interruption, been, from December 1, 1948, to the present time, and continues to be, a retired officer of the regular component of the United States Navy, with the rank of Rear Admiral, United States Navy, entitled to receive, and receiving, pay.

7.

Plaintiff, from prior to December 1, 1948 until the date of the filing of the Amended Complaint herein, was a resident of Coronado, San Diego County, California.

8.

On April 15, 1957, there were received, at Headquarters, Eleventh Naval District, San Diego, California, sworn charges, in the usual form prescribed under the Uniform Code of Military Justice, which charges alleged and specified that plaintiff did, on certain dates, which dates were after December 1, 1948, commit certain offenses in violation of that Code.

9.

On May 6 and 7, 1957, at San Diego, California, before a General Court-Martial convened by order of defendant Hartman, plaintiff, who was personally present thereat, was arraigned and tried upon said charges, the Court-Martial asserting its jurisdiction as under 10 U.S.C. 802(4). At the end of the trial plaintiff was found guilty of certain of said charges, and was thereupon sentenced by the Court-Martial to be dismissed from the service and to forfeit all pay and allowances. [136]

10.

On May 27, 1957, defendant Hartman, as the authority who convened the General Court-Martial, indorsed, in the record thereof, his approval, and forwarded the record to the Judge Advocate Gen-

eral of the Navy for review by a Board of Review.

11.

The Board of Review, on September 10, 1957, affirmed the Court-Martial findings and sentence; and the record was thereafter transmitted to the United States Court of Military Appeals for further review. The Court-Martial case is now before that Court, which has not yet made its decision.

12.

Plaintiff has not at any time been in custody, actual or constructive, nor in any manner restrained of his personal liberty by any arrest, restriction or other limitation; nor is he now or hereafter threatened with any.

13.

Plaintiff has not at any time been deprived of any pay or allowances, nor has he been deprived of any of the rights, privileges, benefits or emoluments of his office, rank or status; nor is he now or hereafter threatened with the loss of any of those, unless and until the findings and sentence of the Court-Martial are finally approved, and the sentence, or some portion thereof, is thereafter ordered into execution.

14.

Plaintiff was never recalled or ordered to active duty in the United States Navy, since his retirement on December 1, 1948 to the present time, including during or after the trial by Court-Martial.

15.

If the aforesaid Court-Martial sentence is approved and ordered executed, the plaintiff will be deprived of a sum in excess [137] of \$3,000, exclusive of interest and costs.

Conclusions of Law

1.

This suit prays for relief in connection with plaintiff's status and pay and allowances, to prevent the general Court-Martial proceedings from having any effect upon them, upon the ground that 10 U.S.C. 802(4) is unconstitutional, and that the Court-Martial was, therefore, without jurisdiction.

2.

The Second Cause of Action is, and the First Cause of Action is not, a civil action, wherein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and arises under the Constitution and laws of the United States, under 28 USC 1331.

3.

As to the First Cause of Action, this Court has no power to issue writs of prohibition except in aid of its jurisdiction otherwise acquired.

In *Re Massachusetts* 197 U.S. 482; *Marshall v. Wyman*, 132 F. Supp. 169.

4.

The Court-Martial sentence against plaintiff not extending to confinement, or other personal re-

straint, the sentence cannot in any manner be increased in severity to include the same, in any future disposition or continuation of the Court-Martial case.

United States v. Stene, 7 USCMA 277; United States v. Kelley, 5 USCMA 259.

5.

This Court has no power to issue a Writ of Habeas Corpus, [138] or treat the Amended Complaint as a petition for same, where it appears plaintiff is neither under any form of custody or personal restraint, nor liable to be under same, in the circumstances.

Biron v. Collins, 145 F. 2d 759; See: Miley v. Lovett, 193 F. 2d 712; cf Boscola v. Bledsoe, 152 F. Supp. 343, aff'd 245 F. 2d 955.

6.

Under the Uniform Code of Military Justice, plaintiff being an officer of Flag rank, neither the Court-Martial sentence, nor any portion of it, can be executed, or ordered to be executed, until affirmed by the Board of Review, the Court of Military Appeals, and the President.

10 U.S.C. 866(b), 867(b)(1), 871(a); United States v. Grow, 3 USCMA 77; See Runkle v. United States, 122 U.S. 543.

7.

The Second Cause of Action being treated as other than a Petition for a Writ of Habeas Corpus,

the Secretary of the Navy is an indispensable party defendant as to so much of the Second Cause of Action as prays for injunction or any relief, other than for the convening of a District Court of Three Judges and a Declaratory Judgment that a statute of the United States, 10 U.S.C. 802(4), is unconstitutional.

Petrowski v. Nutt, 161 F. 2d 938, cert. den. 333 U.S. 842; *Schustack v. Herren*, 234 F. 2d 134; *Money v. Wallin*, 186 F. 2d 411.

8.

The Secretary of the Navy is not an indispensable party defendant, and defendant C. C. Hartman is a sufficient party defendant, as to so much of the Second Cause of Action as prays for the [139] convening of a District Court of Three Judges and for a Declaratory Judgment that a statute of the United States, 10 U.S.C. 802(4), is unconstitutional, and to such extent this Court has jurisdiction of this suit.

Shaughnessey v. Pedreiro, 349 U.S. 48, 53; *Williams v. Fanning*, 332 U.S. 490.

9.

Retired officers of the regular components of the Armed Forces of the United States, entitled to receive pay, are officers of the United States, and the pay is not a pension or annuity, but is an emolument of and dependent upon the office so held.

Badeau v. United States, 130 U.S. 439; *Allen v. United States*, 91 F. Supp. 933.

10.

Upon ceasing to hold the office, the right to pay, being an emolument thereof and dependent thereon, likewise ceases.

Allen v. United States, *supra*.

11.

To the extent that the Court-Martial proceedings against plaintiff involve the exercise of power or discretion by the President of the United States to terminate the holding of an office under the Executive Branch, including membership in the Armed Forces, a court has no power to interfere with such Presidential power, whether the same be exercised in the form of General Court-Martial proceedings or otherwise.

Myers v. United States, 272 U.S. 52; Schustack v. Herren, *supra*.

12.

To the extent that this suit seeks to prevent the [140] stoppage of, or compel the continuation of, the payment of plaintiff's retired pay, his remedy at law by suit against the United States is adequate and unexhausted, and upon this ground therefore, plaintiff is not entitled to any relief concerning the same.

Leeds v. Rossell, 101 F. Supp. 481.

13.

This suit not involving any restraint of plaintiff's personal liberty, and considering all of the

circumstances of the case, the nature of the issues and the character of the remedies available, it is appropriate, just and equitable that plaintiff be required to exhaust the military appellate remedies available to him, for direct review of his Court-Martial, as to all issues, and plaintiff not having done so, plaintiff should have no relief herein and judgment should therefore, upon this ground, be for defendant.

Cf. *Toth v. Quarles*, 350 U.S. 11; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535; *Bevins v. Prindable*, 39 F. Supp. 708, aff'd, 314 U.S. 573; See: *United States v. Sutton*, 3 USCMA 220.

14.

Plaintiff was eligible for and was lawfully transferred to retired status as a member of a regular component of the Armed Forces entitled to receive pay.

34 U.S.C. 410b, 410n.

15.

Since August 3, 1861, there have been in effect at all times, without interruption, statutes which expressly subject to military law and trial by court-martial retired officers of the regular components of the Armed Forces of the United States who are entitled to receive pay. [141]

12 Stat. 290, 291; R.S. § 1457, 34 U.S.C. 389; 64 Stat. 108, 50 U.S.C. 552(4); 70A Stat. 36, 10 U.S.C. 802(4).

16.

Such statutes, including 10 U.S.C. 802(4), are constitutional both generally and as to plaintiff in particular, and the general court-martial proceedings against plaintiff are upon that ground not invalid, and plaintiff is not therefore entitled to any relief herein.

Closson v. United States ex rel Armes, 7 App. D.C. 460; *United States ex rel Pasela v. Fenno*, 167 F. 2d 593, cert. dism. 335 U.S. 806; See: Congressional Record, vol. 53, pages 12844, 12845.

17.

In this suit, seeking to enjoin application of an allegedly unconstitutional statute, District Court of three judges is not required to be convened to hear the matter, notwithstanding the allegations, unless a substantial issue of unconstitutionality is presented by such allegations.

Calif. Water Service Co. v. Redding, 304 U.S. 252; *Wicks v. Sou. Pac. Co.*, 231 F. 2d 130.

18.

The statute involved here, both generally, and as to plaintiff in particular, appears to be constitutional without doubt, to the extent that no substantial issue of its unconstitutionality is sufficiently presented as to require the convening of a District Court of three judges for the disposition of this suit; and upon that ground the application for the

convening of the District Court of three judges should be denied.

See cases cited, *supra*.

Let judgment be entered accordingly. [142]

Judgment

It is Hereby Ordered, Adjudged and Decreed:

1.

That the First Cause of Action herein be, and the same is, dismissed, for lack of jurisdiction in this Court.

2.

That as to the Second Cause of Action, plaintiff shall take no relief herein, and defendant shall have judgment and costs in the sum of \$20.00.

Dated: This 10th day of May, 1958.

/s/ JAMES M. CARTER,
United States District Judge.

Approved, As to Form Only. (Local Rule 7.)

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

JORDAN A. DREIFUS,
Assistant U. S. Attorney,

/s/ JORDAN A. DREIFUS,
Attorneys for Defendant.

ENRIGHT, VON KALINOWSKI
& LEVITT and

HILLYER & CRAKE,

/s/ By OSCAR F. IRWIN,

Attorneys for Plaintiff. [143]

Affidavit of Service by Mail Attached. [144]

[Endorsed]: Filed May 6, 1958. Entered May 8,
1958. Filed May 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Selden G. Hooper, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 13th of May, 1958.

Dated: May 29, 1958.

HILLYER & CRAKE and

ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,

Attorneys for Appellant. [147]

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Appellant intends to rely on this appeal are as follows:

1. This court erred in dismissing plaintiff's first cause of action in plaintiff's complaint on the grounds the court lacked jurisdiction.

2. The court erred in determining that Article II (4) of the Uniform Code of Military Justice is constitutional.

3. The court erred in determining that a court-martial has jurisdiction under Article II (4) of the Uniform Code of Military Justice over a retired officer of a regular component of the Armed Forces drawing pay, when said retired officer has never been recalled to active duty at the time of said court-martial.

4. The court erred in failing to determine whether or not a retired officer of a regular component of the Armed Forces drawing pay is or is not a person within the Armed Forces, or the [150] land or naval forces of the United States as set out in the Constitution of the United States.

5. The court erred in determining that it was without jurisdiction to issue writs of prohibition under the first cause of action of the complaint.

6. The court erred in determining the Secretary of the Navy to be an indispensable party to defendant as to the second cause of action so far as it prayed for injunction or relief other than the con-

vening of the three-judge district court and a declaratory judgment.

7. The court erred in determining retired officers of the regular components of the Armed Forces of the United States entitled to receive pay are officers of the United States.

8. The court erred in determining that the pay of a retired officer of a regular component of the Armed Forces of the United States is not a pension or annuity, but that it is an emolument of and dependent upon the office so held.

9. The court erred in holding and concluding that a court is without power to interfere with presidential power in the form of the exercise of said power to a court-martial proceeding against the plaintiff and the court is concluding that such power may be exercised without jurisdiction or without due process of law as required in the Constitution and Statutes of the United States.

10. The court erred in determining that the plaintiff had not exhausted his remedies by law against the United States to compel the continuation of retirement pay.

11. The court erred in determining and concluding that it is just and equitable to require plaintiff to exhaust military appellate remedies for direct review of the court-martial as to all issues therein, inasmuch as plaintiff is not seeking review of the court-martial, but only a determination as to constitutionality [151] of a Statute pursuant to declaratory relief which provides that said remedy is

available regardless of the availability of any other remedies.

12. The Court erred in determining that a District Court of three judges was not required to hear the matter because a substantial issue of constitutionality was not presented by the complaint.

13. The court erred in denying the relief prayed in the complaint herein.

Dated: May 29, 1958.

HILLYER & CRAKE and
ENRIGHT, VON KALINOWSKI
& LEVITT,

/s/ By OSCAR F. IRWIN,
Attorneys for Appellant. [152]

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 154, inclusive, containing the original:

Petition for Writ of Prohibition;

Points and Authorities for Writ of Prohibition;

Dismissal of Petition;

Amended Complaint for Writ of Prohibition;

Application for leave to file Supplement to Motion, etc.;

Memorandum in support of Motion to Dismiss and for Summary Judgment, etc.;

Motion by Plaintiff to substitute parties defendant;

Plaintiff's Memorandum in opposition to Defendants' Motion to Dismiss and for Summary Judgment;

Supplemental Memorandum, filed 10/4/57;

Second Supplemental Memorandum, filed 11/19/57;

Exhibit 6 (Supplement);

Stipulation and Order, filed 3/27/58;

Memorandum by Court;

Findings of Fact, Conclusions of Law and Judgment, filed 4/8/58;

Motion to Amend and Supplement Findings of Fact, and Conclusions of Law;

Affidavit and Order, filed 4/22/58;

Copy of Clerk's notice of entry of Findings of Fact, etc.;

Findings of Fact, Conclusions of Law and Judgment, entered 5/13/58;

Proof of Service by Mail, re Designation of Record on Appeal, etc.;

Notice of Appeal;

Designation of Record on Appeal;

Statement of Points on Appeal;

Counter Designation of Record on Appeal.

B. Minute Orders for 9/9/57, 1/10/58, 4/11/58 and 5/10/58.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: June 17, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 16058. United States Court of Appeals for the Ninth Circuit. Selden G. Hooper, Appellant, vs. C. C. Hartman, Rear Admiral USN, Commandant, Eleventh Naval District, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: June 18, 1958.

Docketed: June 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16058

SELDEN G. HOOPER, Appellant,

vs.

C. C. HARTMAN, Rear Admiral USN, Comman-
dant, Eleventh Naval District, Appellee.

STATEMENT OF POINTS ON APPEAL

The points upon which Appellant intends to rely
on this appeal are as follows:

1. Appellant hereby adopts the Statement of
Points on Appeal filed in the United States District
Court, Southern District, Southern Division for
California, commencing and appearing at Page 150
of the certified transcript of record in the above
entitled action.

Dated: July 1, 1958.

HILLYER & CRAKE,
/s/ By OSCAR F. IRWIN,
Attorneys for Appellant.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO
BE PRINTED ON APPEAL

Comes now the Appellant, Selden G. Hooper, and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal of the above entitled action:

1. Order of May 3, 1957, allowing the filing of Amended Complaint for Prohibition. (Page 11, transcript of record.)
2. Amended Complaint and/or Petition for Writ of Prohibition and for Declaratory Relief. (Page 12, transcript of record.)
3. Defendant's Motion to Dismiss and for Summary Judgment. (Page 30.)
4. Defendant's Notice of Motion to Dismiss and for Summary Judgment. (Page 29.)
5. Findings of Fact and Conclusions of Law filed May 13, 1958. (Page 134, transcript of record.)
6. Judgment entered May 13, 1958. (Page 134, transcript of record.)
7. Notice of Appeal filed June 2, 1958. (Page 147, transcript of record.)
8. Statement of Points on which Appellant intends to rely, filed June 2, 1958. (Page 150, transcript of record.)
9. Memorandum Opinion of the Court filed March 28, 1958, and Corrections of said Memorandum Opinion of April 11, 1958. (Page 110, transcript of record.)
10. This Designation.

11. Exhibit "A" attached to the original complaint and petition for writ of prohibition.

Dated: July 1, 1958.

HILLYER & CRAKE,
/s/ By OSCAR F. IRWIN,
Attorneys for Appellant.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF RECORD
TO BE PRINTED

In addition to the matter designated to be printed by appellant, appellee designates the following matter to be included in the printed record. The matters are indicated by their description and by the approximate page number in the Record on Appeal as nearly as could be estimated.

1. Affidavit of C. C. Hartman. (R. 32.33.)
2. Letter dated April 29, 1957, from Commandant, etc. (about R. 35).
3. General Court-Martial Order No. 90-57. (R. 36.) (2 sheets.)
4. Affidavit of James L. Holloway. (R. 62-65.)
5. From Exhibit 4 (R. 66) the following only:
Letter dated July 12, 1958, from Selden G. Hooper (att. 1);
Letter dated Dec. 8, 1948 from Sec. Navy (att. 4);

Indorsement in handwriting dated Dec. 13, 1948 (att. 5);

“Transcript of Naval Service” (att. 6).

6. From Exhibits 5, (R. 67) the following only: Letter dated Sept. 19, 1949 (att. 3).

7. From Exhibits 6A-D the following only: (R. 99-102):

Certificate of Herbert M. Jones;

Letter from Chief of Naval Personnel;

Certificate of Allen Winbeck;

Letter from C. A. Rigaud.

8. From Exhibit 6E (R. 104) the following only: Certificate of Eugene Moriarty.

9. Stipulation and Order filed May 27, 1958 (R. 108).

10. This Counter Designation.

Dated: This 3rd day of July, 1958.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorney for Appellee.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 7, 1958. Paul P. O'Brien,
Clerk.

United States Court of Appeals
FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral
USN, Commandant, Eleventh
Naval District,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for
the Southern District of California
Southern Division

HILLYER & CRAKE and
OSCAR F. IRWIN
726 Bank of America Building
San Diego 1, California
Attorneys for Appellant

FILED

SEP 25 1958

PAUL P. O'BRIEN, CL

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No. 16058

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

VS.

C. C. HARTMAN, Rear Admiral
USN, Commandant, Eleventh
Naval District,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

Jurisdiction of the action was in the District Court by virtue of United States Code, Title 28, Sec. 1331, 62 Stat. 930, there being involved in the matter in controversy a sum in excess of \$3,000.00, exclusive of

interest and costs, involving a question arising under the Constitution and laws of the United States, (Clk's Tr., p. 11).

The question arising under the laws of the United States pertains to the constitutionality of 50 U.S.C., Sec. 552(4);--64 Stat. 109-- commonly known as Article II, Uniform Code of Military Justice, Sec. 4, providing:

"The following persons are subject to this Code: . . .

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay; . . ."

The issue of constitutionality of said section presented was whether or not it lay within the power of Congress to confer such jurisdiction in courts martial of the military services under Art. I, Sec. 8, Cl. 14, of the United States Constitution, providing:

"The Congress shall have power. . . to make rules for the government and regulation of the land and Naval Forces; . . ."

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the District Court, on motion of Appellee, dismissed Appellant's first cause of action, (Clk's Tr. p. 70). Pursuant to Rule 56, Federal Rules of Civil Procedure, the District Court granted judgment for Appellee as to Appellant's second cause of action, (Clk's Tr., p. 70). Said judgment of dismissal on the first cause of action and in favor of Appellee on the second

cause of action, being final, jurisdiction to hear this appeal became vested in the above entitled Court pursuant to 28 U.S.C. , Section 1291, 65 Stat. 726. Said District Court being within the circuit embraced by the above entitled Court as defined in 28 U.S.C. , Section 1294, 65 Stat. 727, Appellant's appeal to the above entitled Court was duly perfected pursuant to Rule 73 of the Federal Rules of Civil Procedure within the time required by law, (Clk's Tr. , p. 71).

STATEMENT OF CASE

Appellant was commissioned an officer in the United States Navy with the rank of Ensign, June 2, 1927. He thereafter served in the United States Navy until December 1, 1948, when Appellant was retired with the rank of Rear Admiral from the regular United States Navy. From December 1, 1948, Appellant received income from the United States Government as a retired officer of the United States Navy with the rank of Rear Admiral. (Findings of Fact 2, 5 and 6, Clk's Tr. pgs. 60-61).

In April, 1957, charges were filed with the Headquarters of the Eleventh Naval District, San Diego, California, under the Uniform Code of Military Justice, alleging Appellant committed offenses against said Code after December 1, 1948. (Findings of Fact 8, Clk's Tr. p. 62).

A general court martial was convened by order of the Appellee, C. C. Hartman, Rear Admiral USN, Commandant, Eleventh Naval District, San Diego, California, and on May 6th, and 7th of 1957, Appellant was

interest and costs, involving a question arising under the Constitution and laws of the United States, (Clk's Tr. , p. 11).

The question arising under the laws of the United States pertains to the constitutionality of 50 U.S.C., Sec. 552(4);--64 Stat. 109-- commonly known as Article II, Uniform Code of Military Justice, Sec. 4, providing:

"The following persons are subject to this Code: . . .

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay; . . ."

The issue of constitutionality of said section presented was whether or not it lay within the power of Congress to confer such jurisdiction in courts martial of the military services under Art. I, Sec. 8, Cl. 14, of the United States Constitution, providing:

"The Congress shall have power. . . to make rules for the government and regulation of the land and Naval Forces; . . ."

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the District Court, on motion of Appellee, dismissed Appellant's first cause of action, (Clk's Tr. p. 70). Pursuant to Rule 56, Federal Rules of Civil Procedure, the District Court granted judgment for Appellee as to Appellant's second cause of action, (Clk's Tr. , p. 70). Said judgment of dismissal on the first cause of action and in favor of Appellee on the second

cause of action, being final, jurisdiction to hear this appeal became vested in the above entitled Court pursuant to 28 U.S.C., Section 1291, 65 Stat. 726. Said District Court being within the circuit embraced by the above entitled Court as defined in 28 U.S.C., Section 1294, 65 Stat. 727, Appellant's appeal to the above entitled Court was duly perfected pursuant to Rule 73 of the Federal Rules of Civil Procedure within the time required by law, (Clk's Tr., p. 71).

STATEMENT OF CASE

Appellant was commissioned an officer in the United States Navy with the rank of Ensign, June 2, 1927. He thereafter served in the United States Navy until December 1, 1948, when Appellant was retired with the rank of Rear Admiral from the regular United States Navy. From December 1, 1948, Appellant received income from the United States Government as a retired officer of the United States Navy with the rank of Rear Admiral. (Findings of Fact 2, 5 and 6, Clk's Tr. pgs. 60-61).

In April, 1957, charges were filed with the Headquarters of the Eleventh Naval District, San Diego, California, under the Uniform Code of Military Justice, alleging Appellant committed offenses against said Code after December 1, 1948. (Findings of Fact 8, Clk's Tr. p. 62).

A general court martial was convened by order of the Appellee, C. C. Hartman, Rear Admiral USN, Commandant, Eleventh Naval District, San Diego, California, and on May 6th, and 7th of 1957, Appellant was

tried on the alleged offenses, found guilty of some of the offenses, and ordered to be dismissed and forfeit all pay and allowances under said sentence of guilty, (Findings of Fact 9, Clk's Tr. p. 62).

Prior to the court martial, but subsequent to the ordering of Appellant to appear there, Appellant filed on May 2, 1957, in the United States District Court, in and for the Southern District of California, Southern Division, a Petition for a Writ of Prohibition against said court martial. On May 3, 1957, by order of said District Court, said petition was ordered dismissed, with leave to file an amended petition, (Clk's Tr. p. 3-4). Thereafter an amended complaint and petition for a writ of prohibition and for declaratory relief was filed in the District Court by Appellant on the 15th of May, 1957, (Clk's Tr. p. 4). Appellant's complaint in the second cause of action prayed for declaratory relief, pursuant to Title 28, U.S.C., Secs. 2201 and 2202, 68 Stat. 890, 62 Stat. 964. This remedy was invoked to determine the constitutionality of the statute conferring court martial jurisdiction upon the Armed Forces over retired officers of a regular component receiving pay, 50 U.S.C., Sec. 552 (4); 64 Stat. 109, Uniform Code of Military Justice Act, Sec. 2(4); said statute being hereinafter referred to as "UCMJ, Sec. 2(4)", (Clk's Tr. pgs. 13 - 16).

Appellant requested the appointment of a three-judge court to determine the constitutionality of UCMJ, Sec. 2(4), pursuant to 28 U.S.C., Sec. 2282; 62 Stat. 968, (Clk's Tr. p. 18). The District Court ruled there was no substantial question of constitutionality involved and therefore it was not required to convene a three-judge court, (Clk's Tr. p. 58).

The issue presented to the District Court was whether or not retired officers of a regular component of the Armed Forces, to wit: The Navy, entitled to receive pay, are persons within the land or naval forces of the United States within the meaning of Art. I, Sec. 8, Cl. 14, of the United States Constitution so as to allow the Congress of the United States to pass a statute conferring jurisdiction over such persons in a court martial of the United States Navy.

The District Court granted the Appellee's motion to dismiss Appellant's complaint as to the first cause of action, pursuant to Rule 12, Federal Rules of Civil Procedure, upon a determination no grounds for federal jurisdiction were alleged. Appellee's motion for summary judgment on Appellant's second cause of action, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was granted and ruled the challenged statute to be constitutional, such judgment entered May 10, 1958 by the District Court is final.

SPECIFICATION OF ERRORS RELIED UPON ON APPEAL

Appellant hereby specifies the following errors as having occurred in the District Court:

1. The District Court erred in determining that Article 2(4) of the Uniform Code of Military Justice is constitutional.

2. The District Court erred in determining that the court martial had jurisdiction under Article 2(4) of the Uniform Code of Military Justice over a retired

officer of a regular component of the armed forces drawing pay, when said retired officer has never been recalled to active duty at any time prior to, during or subsequent to the court martial.

3. The District Court erred in determining that the pay of a retired officer of a regular component of the armed forces of the United States is not a pension, but that it is an emolument of and dependent upon the office so held.

4. The District Court erred in determining and concluding that it is just and equitable to require Appellant to exhaust his military appellate remedies for direct review of the court martial and to all issues therein, when Appellant is seeking only a declaratory action judgment as to the constitutionality of the statute.

ARGUMENT

I

Article 2, Section 4, of the Uniform Code of Military Justice is unconstitutional.

It is undisputed that Appellant herein is a person as defined in Art. 2, Sec. 4 of the Uniform Code of Military Justice, 50 U.S.C., Sec. 552(4), 64 Stat. 109, the precedent of which was set out in 10 U.S.C., Sec. 802(4), 70A Stat. 641.

The District Court held that it had jurisdiction as to the second cause of action in Appellant's complaint so far as it requested a declaratory judgment as to the

constitutionality of the statute conferring jurisdiction, Findings of Fact 2 and 8, (Clk's Tr. p. 64 and 66). See also Memorandum Opinion of District Court, (Clk's Tr. p. 56).

Appellant was never confined and therefore habeas corpus was never available as a remedy for testing the jurisdiction of the court martial on the grounds the statute under which jurisdiction was asserted was unconstitutional.

The only cases upholding the precedent of UCMJ, Art. 2(4), are Closson vs. U.S., 7 App. D.C. 460, Murphy vs. U.S., 38 Ct. Cl. 511; and Runkle vs. U.S. 19 Ct. Cl. 396. Since the cases cited above were decided, the issue of courts martial jurisdiction over persons bearing some relation to the military, but not in active service in the military at the time of court martial, have received extended treatment by the United States Supreme Court.

The U. S. Supreme Court in U.S. vs. Quarles, 350 U.S. 11, and Reid vs. Covert, 354 U.S. 1, laid down a test to determine validity of congressional acts purporting to confer court martial jurisdiction over persons.

In the Reid case the court pointed out that a trial before a jury and civilian judge are fundamental rights, 354 U.S. 1.

The Court considered the fact the defendant could be tried for the offense other than by a court martial as persuasive, at Page 17. The court stated:

"The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined. "

Nor may the necessary and proper clause be used to extend military jurisdiction to a group of persons beyond that class described in Clause 14.

The court also stated:

". . . the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Article 1, Section 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections", Page 21.

The court noted that the exception in the Fifth Amendment to grand jury indictment for persons in the land or naval forces is persuasive that persons are not encompassed who cannot fairly be said to be "in" the military service, Page 22. Thus the court notes that by the very nature of a court martial its jurisdiction is to be construed in an extremely narrow manner and in determining who may be said to be "in" the military service, the court will give the word its narrowest possible construction. The court even noted that there was not any common law basis for the court martial of

ser vicemen in peace time, Pages 24 and 25.

In the same case the court again showed great concern with determining who are actually in the service within the meaning of the Constitution and pointed out that any arguments about necessity of jurisdiction over persons is immaterial, stating:

"The Constitution does not say that Congress can regulate the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces", Page 30.

They specifically rejected the government's argument that extension of the military jurisdiction over dependents of servicemen overseas was slight and that the need was great, Page 39. They specifically noted that even Winthrop pointed out in Military Law & Precedents (2d Ed. 1896, Page 145) that the Constitution does not recognize a third class of persons who are military for one purpose and civilian for another.

In U. S. vs. Quarles, 350 U. S. 11, the court pointed out that Congress may confer jurisdiction in a court martial over a person only under Art. 1, Sec. 8, Cl. 14, of the Constitution, granting Congress the power to make rules for government and regulation of the land and naval forces as supplemented by the necessary and proper clause. The court pointed out that the power to make rules "would seem to restrict court martial jurisdiction to persons who are actually members or part of the Armed Forces", Page 15. The court noted that a statute authorizing court martial trial of inmates of the Soldiers Home was ruled unconstitutional

by the Army's Judge Advocate General in Digest Opinions JAG (1912), Pages 1010, 1012.

In determining the scope of court martial jurisdiction it was noted that:

"Unlike courts, it is the primary business of armies and navies to fight or to be ready to fight war should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function", Page 17.

Here again the court looked to the impact on military discipline of the event involved in determining whether jurisdiction was necessary in a court martial under the Constitution.

In both the Reid and Toth cases the Supreme Court noted the significance involved due to the large number of persons in the United States purportedly brought under court martial jurisdiction by the Uniform Code. In the Toth case the court noted that there were more than three million persons placed under the Code by the statute the government attempted to use to try Toth in Korea. In this case over 172,000 retired personnel are affected, (Appellee's Exhibits 6A - 6E, Clk's Tr. p. 46 - 50).

The court also noted as a significant factor in determining whether jurisdiction existed, the issue of whether or not the alleged defendant could be tried other than by a court martial, Page 21 of the Toth opinion.

In the Toth case the court states that in determining the scope of the constitutional power of Congress to authorize trial by court martial, there was presented another instance calling for, "limitation to the least possible power adequate to the end proposed", Page 23.

In both the Toth and Reid cases the court was unconcerned with ancient precedent, obviously because of the great change in the size of the military and the effect of granting jurisdiction that has occurred since the issue was passed on many years before. So in the Reid case the court overruled re Ross, 140 U. S. 453 as obsolete, and in the Toth case rejected re Bogart, 3 Fed. Cases 796 No. 1596 (C.C. Cal.). It is apparent that cases of long standing are not persuasive in the U. S. Supreme Court in re-evaluating the constitutional power of Congress to grant court martial jurisdiction to the military over persons today.

It is Appellant's contention that the rationale of the Toth and Reid cases exactly fits the case of plaintiff herein.

First: In the Toth and Reid cases the defendants had some relation to the military, being a former member in the Toth case and the dependent of an active member in the Reid case. The court pointed out that this relationship was not substantial enough to mean the person was in fact "in" the military service within the constitutional meaning, although recognizing that a relationship did exist directly to the military. So in plaintiff's case, as a retired member of the Armed Forces, there is a relationship, but it cannot be said that he is at present actually "in" the military service.

Second: The Supreme Court noted the status of the defendant at the time the alleged crime was committed. In the Toth case the defendant was actually a member at the time of the act and in the Reid case the dependent of a member actually in the service on duty, while in Appellant's case he was a retired member who had far less connection to the military service than the defendants in the Toth and Reid cases at the time the acts allegedly occurred.

Third: The Supreme Court took note of whether the defendants could be subject to punishment if they were not tried in a military court. In the Toth case and the Reid case neither defendant could be punished other than by a court martial, although it was pointed out Congress could cure this defect in the future. In plaintiff's case he was and is amenable to punishment in the courts of the State of California so that there is less necessity for jurisdiction over the Appellant than there was over the defendants in the Reid and Toth cases.

Fourth: The Supreme Court noted the relation of the offense of the defendant to the discipline of the armed forces and maintenance thereof. It specifically noted that such a consideration was important in determining jurisdiction, yet it struck down jurisdiction in both the Toth and Reid cases, although it made a finding that the relationship to discipline was great. It is obvious that in Appellant's case there is no relationship to military discipline since the alleged offense is a common law crime tryable in the state courts, see California Penal Code, Sec. 288a. The alleged act is neither factually nor actually related to the military nor maintenance of discipline therein.

Fifth: The court, in the Toth and Reid cases, gave great consideration to the effect of upholding the jurisdiction sought to be conferred on the military by the Uniform Code. In the Toth case they took specific note of the great number of ex-servicemen over whom jurisdiction could be asserted, and in the Reid case they took note of the large number of American dependents serving overseas. They found that the jurisdictional effect of the statute was great upon the civilian population of the United States. So in the Appellant's case we find an attempt to assert jurisdiction over every single member of the Armed Forces who is retired from regular status. The number of such persons exceeds 170,000. Obviously these retired persons have severed themselves from the military service, except for the requirement that they can be recalled to active duty in time of war or national emergency, 10 U.S.C., Sec. 6481, 70A Stat. 641. Their receipt of pay and certain medical benefits is a reward and right growing out of the active service previously rendered. It is certainly of common knowledge that the number of such persons over whom court martial jurisdiction can be asserted in the United States is great. If the act herein questioned is held constitutional, then every retired serviceman is a regular member of the Army, Navy or Air Force throughout his life and is subject to court martial jurisdiction for conduct in essentially civilian pursuits. Every retired Naval officer who receives a traffic ticket, or is charged with driving while intoxicated could be subject to court martial jurisdiction, sentence and imprisonment under the Uniform Code and the civilian courts ousted of their traditional and preferred jurisdiction over such crimes. It is the position of Appellant that the rationale of the U. S. Supreme Court in the Toth and Reid cases requires a holding that the act herein questioned is unconstitutional

and by every test for constitutionality set forth in the Toth and Reid cases, the need to strike down the statute is even greater in Appellant's case.

The relation of factors that were controlling in the rationale of the Toth and Reid cases to the case at bar can be graphically illustrated as follows:

	<u>Toth</u>	<u>Reid</u>	<u>Hooper</u>
(1) Relation of Defendant to Service	Former Member	Dependent of Member	Retired Member
(2) Status when crime committed	Member	Dependent of Member	Retired Member
(3) If no military jurisdiction, is punishment possible?	No	No	Yes
(4) Relation of Offense to Discipline	Great	Great	None
(5) Numbers affected if jurisdiction upheld	Great	Great	Great

The defendant indicates that because of the relationship of a retired officer to the Armed Forces, court martial jurisdiction is necessary. The Navy Department

publishes a bulletin for official circular letters to all ships and stations, and in Volume XI, No. 5, published September 15, 1947, it is stated therein at 47-864:

"Retired officers are not required to hold themselves in readiness. They may be ordered to active duty in time of war or national emergency in the discretion of the Secretary of the Navy, but may be ordered to active duty in time of peace only subject to consent of the officer."

It would seem apparent from this official Navy statement of the law regarding retired officers that their connection with the military after retirement is extremely slight.

It is Appellant's position that the cases relied on to sustain court martial jurisdiction over retired regular personnel have been overruled by implication by the United States Supreme Court in the Toth and Reid cases. In fact, Tyler vs. U.S., 16 Ct. Cl. 223, Runkle vs. U. S., 19 Ct. Cl. 396, and Franklin vs. U.S., 29 Ct. Cl. 6, are not square holdings as to the constitutionality of the statute purporting to confer court martial jurisdiction in the military services over retired personnel. The Runkle case contains only dicta that retired officers are subject to court martial, because the question before the Court of Claims related to longevity for pay purposes. Runkle had been ordered to be tried by a court martial appointed by the President of the United States and sentence was later set aside, which caused the suit in the Court of Claims. Tyler vs. U.S. was merely a holding that retired officers are "in service" for certain pay purposes, but it is not a holding that such officers are "in service" for purposes of court

martial. Franklin vs. U.S. was also a question concerning pay of retired officers and not directly concerned with court martial jurisdictions. Thus the Court of Claims decisions are not only "stale" cases, so far as they relate to the factual picture today, but are not even holdings that the statute in question is constitutional for the purposes under consideration in the case at bar. The issue to finally be determined is whether or not the Appellant was "in" the military services within the meaning of the Constitution.

It is submitted that where Appellant has been retired from the military service for a number of years and is not on active reserve duty, he cannot be recalled to active duty other than under specified conditions which do not exist, and the alleged offense is a common law crime traditionally tryable by a civil court and is not of a nature to affect the military discipline of the services, that the Appellant is not within the military service within the meaning of the Constitution. Certainly if under the mandate of the Supreme Court, court martial jurisdiction is to be confined to a scope necessary to maintain proper discipline in the armed forces, there was no necessity for such jurisdiction over Appellant or other retired officers of a regular service, where their only connection to the service is retirement pay with the possibility of being recalled to service in time of a national emergency. For the foregoing reasons it is submitted that the statute in question is unconstitutional and was beyond the power of Congress under the Constitution of the United States.

II

The District Court Erroneously Determined
That the Court Martial Had Jurisdiction Over
a Retired Officer, When Said Retired Officer
Was Never Recalled to Active Duty at Any
Time Prior to or During Said Court Martial.

There appears to be no rational or legal argument that a retired officer is "on duty" in any sense, although he is, of course, entitled to certain benefits. The very fact that Congress has by 10 U.S.C., Sec. 6481, 70A Stat. 641, provided a means for ordering a retired officer to "active duty", necessarily implies that Congress considered a retired officer not "on duty". 10 U.S.C., Sec. 6481, 70A Stat. 641 provides:

"In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the regular Navy . . . to active duty . . . At any other time the Secretary may order such a retired officer to active duty . . . only with his consent."

The Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481) defines duty as "military service of any nature under orders or authorization by competent authority." Thus duty is doing what is ordered by competent authority. If competent authority orders a person to stand trial, with the jurisdictional requisites, then it is his duty to do so. But what was the authority of the Commandant of the Eleventh Naval District to order a retired officer to duty? By 10 U.S.C., Sec. 6481, 70A Stat. 641, Congress provided that retired officers may not be ordered to active duty save in

time of war or national emergency and then only by the Secretary of the Navy. The order for the trial at bar was not issued by the Secretary of the Navy; consequently assuming arguendo the existence of a war or state of national emergency, the Commandant's order to stand trial was illegal unless the Secretary had delegated his authority to the Commandant. No such naval regulation or order can be found granting such delegation of authority.

In Pasella vs. Fenno, 167 Fed. 2d, 593, the Court of Appeals stated at Page 594:

"We may take it for granted as the Appellant insists that the court martial was without power to try him unless the following conditions were met:

1. That he could lawfully be recalled to active duty for purposes of the court martial;
2. That he was subject to Naval law at the time of the theft and of his recall; and
3. That the offenses for which Appellant was tried fell within the category of 'cases arising in the land and Naval forces,' to which the Fifth Amendment requirement of presentment or indictment by grand jury does not apply. The relators status as a member of the Fleet Reserve therefore assumes primary importance and will first be considered

. . . . Thus Appellant could lawfully be recalled to active duty, nothing in the statute or

"legislative history indicating that a call to active duty solely for purposes of court martial proceedings is not permissible."

Why then did the Secretary of the Navy not order Appellant to active duty so as to avoid the question of whether or not Appellant was in the status allowing court martial at the time of trial? The answer is contained in Boscola vs. Bledsoe, and Smith vs. Thomas, 152 Fed. Supp. 343, affirmed, per curiam, by this Honorable Court, 245 Fed. 2d 955. In these cases both Boscola and Smith had completed 30 years of service in the Navy and been retired. Subsequently they were prosecuted by civil authorities and plead guilty, resulting in imprisonment in the Washington State Penitentiary for civil offenses committed after their retirement. On their release from the state penitentiary they were handed orders to active duty and taken into custody pending trial by military court martial for the state offenses for which they had been imprisoned. The District Court granted writs of habeas corpus on the theory that Congress in enacting 34 U.S.C., Sec. 433, 39 Stat. 591, (now 10 U.S.C., Sec. 6482, 70A Stat. 641) did not intend to permit ordering retired regulars to active duty solely to permit trial by court martial. 10 U.S.C., 6482, pertaining to the recall of retired and enlisted personnel, is practically verbatim the same as 10 U.S.C., 6481, pertaining to officers, and it thus follows that even the Secretary of the Navy could not have ordered Appellant to active duty to stand trial by court martial, (Findings of Fact 14, Clk's Tr. p. 63).

A reservist may not be recalled into the Navy after being released from active duty to give a Naval Court jurisdiction to try him for an offense committed while

in active service, U. S. vs. Naval Prison, 265 Fed. 787. An inactive member of the Naval Reserve is not subject to court martial, Viscardi vs. MacDonald, 265 Fed. 695.

It is the general rule that a person is amenable to military jurisdiction only during the period of his actual service, Ex Parte Drainer, 65 Fed. Supp. 410.

In Ex Parte Mulvaney, 82 F. Supp. 743, the court said:

"but it does point to why upon these facts the Navy had no jurisdiction of the alleged crime for it is substantially devoid of military disciplinary significance. The sovereignty offended alone has the power and right to prosecute the accused for the substantive offense of rape committed within its exclusive jurisdiction. The incidental fact that the accused is a Navy man does not transfer this essential jurisdiction to the Navy courts, nor give it concurrent jurisdiction in the absence of an expression by Congress to that effect."

Contra: Pasella vs. Fenno, 167 F. 2d 593.

Since it follows that Appellant could be court martialled only if recalled to active duty, which never occurred, the constitutional question as to the statute conferring jurisdiction can be avoided. If it is assumed that being recalled to active duty makes Appellant a person "in the land or naval forces" within the meaning of the Fifth Amendment, still that was not the case at bar due to the failure to order Appellant to active duty. Thus the question of the constitutionality of Article 2(4)

of the U. C. M. J. can be avoided, along with the problem that the statute under the District Court's interpretation would permit any military commander to seize the person of any retired regular off the streets of the United States and thrust him before a court martial. Such a result is absurd and should be avoided because of the desire to avoid constitutional questions as to statutes where other grounds properly are before the court for determining the case at bar.

The issue of failure to recall Appellant to active duty for purposes of the court martial was plead and before the District Court, (Paragraph VI of Appellant's second cause of action, Clk's Tr. p. 12 - 13).

No valid reason appears why any distinction exists or should exist between officers who are retired from a regular component of the Armed Forces and a reservist who may not be recalled into the Navy after release from active duty in order to give a Naval court jurisdiction to try him for an offense, U. S. vs. Naval Prison, 265 Fed. 787. What possible distinction exists between Appellant and an inactive member of the Naval Reserve who is not subject to court martial, Viscardi vs. MacDonald, 265 Fed. 695; see also Ex Parte Mulvaney, 82 Fed. Supp. 743, and Ex Parte Drainer, 65 Fed. Supp. 410.

The highest law officers of the service themselves have held jurisdiction should not exist. An officer in inactive status may not be restored to active duty so as to prosecute him, 31 Opinions Attorney General 521; 4 JAG Bull. 35 (1946).

It is respectfully submitted that regardless of the

constitutionality of the section under which jurisdiction is claimed over Appellant, jurisdiction did not exist, due to the failure to recall Appellant to active duty for purposes of being court martialed. Not being on active duty at the time of said court martial, Appellant could not be said to be a person in the land or naval forces of the United States at the time of trial.

III

The Court Erroneously Determined Pay of a Retired Officer of a Regular Component of the Armed Forces of the United States Is Not a Pension or Annuity, But That It Is an Emolument of and Dependent Upon the Office So Held.

The act alleged to have been committed by Appellant occurred almost ten years after his retirement from the United States Navy. It is respectfully urged here that the portion of the sentence providing for total forfeiture was illegal, and the District Court should have so ruled, in that Appellant had a vested right in said retirement pay for military services previously rendered. Appellant was not performing any military service at the time of the alleged offense, nor at the time of the court martial. He was receiving a pension for military service performed long prior to the alleged offense. The compensation was for military services rendered in the past, and Appellant had previously satisfied all conditions required for the granting of the compensation which he was receiving.

The Navy's own interpretation as to retirement benefits of regular officers is persuasive. Vice

Admiral J. L. Holloway, Jr., of the U. S. Navy, whose affidavit is attached as an exhibit in the above action (Clk's Tr. p. 35 - 39), wrote a foreword to the "Navy Guide for Retired and Fleet Reserve Personnel", published in November, 1956, by the Department of the Navy, Bureau of Naval Personnel, in which the pay of retired naval officers is discussed, and therein Vice Admiral Holloway states:

"Therefore, the material benefits outlined in this pamphlet are not gifts. They are rights that you have earned."

It would conclusively appear by his own statement that the Chief of Naval Personnel regards retired pay as a vested right, having been earned, and therefore not subject to forfeiture for subsequent acts. If retirement compensation were pay for being ready or prepared for recall to active service, why should such pay not be terminated upon an officer becoming totally disabled or mentally incompetent to the extent he would not be subject under any circumstances to recall for active service? The only reason is that the compensation paid to retired officers is a pension for services previously rendered and not pay for being "in" the Naval Forces.

It is therefore submitted that the District Court erroneously determined that retired officers' pay depended upon the office so held and was thereby subject to forfeiture should a court martial order the officer dismissed from the service.

IV

The District Court Erroneously Ruled That
Appellant Must Exhaust Military Appellate
Remedies for Direct Review of the Court
Martial as to All Issues Therein Before
Seeking Any Relief in the United States Courts.

There would be no question but that had Appellant been confined, he might by the use of habeas corpus in Federal Court, attack the jurisdiction of the court martial under the statute in question. However, habeas corpus is merely a collateral remedy and there is no reason why other collateral remedies should not be invoked to determine the same issue. Collateral attack, other than by habeas corpus on court martial jurisdiction, has been recognized, Shapiro vs. United States, 107 Ct. Cl. 650, 69 F. Supp., 205. Military courts are not courts within the meaning of Article III of the United States Constitution and thus the accused, Appellant herein, could not be required to submit to the judgment of a military court lacking jurisdiction of the person, Ex Parte Quirin, 317 U.S. 1. Courts martial are special statutory tribunals and their judgment is open to collateral attack. Unless facts essential to their jurisdiction appear, it must be held not to exist, Collins vs. McDonald, 258 U.S., 416. See also Reid vs. Covert, 354 U.S. 1; Toth vs. Quarles, 350 U.S. 11.

28 U.S.C., Sec. 2201, 68 Stat. 890 states:

"Any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added).

Rule 57, Fed. Rules of Civ. Proc. states:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

Thus it would seem clear that by virtue of the above statute and rule, Appellant's suit need not abate until military review of the conviction is final.

Appellant at no time sought any review of the court martial or as to how it was convened or conducted, or the occurrences or evidence submitted therein. Appellant has only requested a determination of the constitutionality of the statute under which jurisdiction was asserted. If there was no jurisdiction there was no valid court martial and it would be burdensome, time consuming and cause a circuitry of actions to require Appellant to wait until the military appellate review as to the factual occurrences in the court martial were completed. The question presented the District Court was not one of guilt or innocence, nor one of a fair or unfair trial, but solely one of the constitutionality of a statute. The District Court ruled it had jurisdiction to hear such a suit. Appellant submits that having the jurisdiction to determine the constitutionality of the statute, the court did not have any equitable jurisdiction to refuse to determine the issues thus presented to the court.

A person may bring an action for declaratory judgment to prevent his deportation without awaiting arrest to allow the bringing of habeas corpus proceedings, McGrath vs. Kristensen, 340 U. S. 162. This is so even if the petitioner might have sued in an independent

proceeding under Section 10 of the Administrative procedure act to obtain judicial review, Id.

Injunctive relief may be granted under such a proceeding, Perkins vs. Elg, 99 Fed. 2d 408, and prohibition is a remedy which is available where there is no other adequate remedy, Poliszek vs. Doak, 57 Fed. 2d 430.

The remedy sought herein to test jurisdiction is proper since it has long been held that civil courts may, by appropriate proceedings, prohibit a court martial from trying a civilian, Ex Parte Henderson, 11 Fed. Cases 6349 (C. C. Ky. 1878). Whether a person is or is not in the Armed Forces must be determined by the civilian courts under the rules of due process, Robinson vs. Keating, 121 Fed. Supp. 477.

The problem of allowing the declaratory judgment to determine the propriety of deportation without awaiting arrest, or without pursuing the normal administrative remedies, is closely analogous to the problem herein of the right of Appellant to have the issue as to the constitutionality of the statute conferring jurisdiction determined prior to the determination of the court martial proceedings. See Toth vs. Quarles, 350 U.S. 11. The District Court below erroneously analogized the system of military appellate review to the state court system, and thus determined that the question should be resolved within that framework prior to bringing a suit in Federal Court. This ignores the fact that courts martial, unlike state courts, are special statutory tribunals without general jurisdiction and their judgment is open to collateral attack. Unless facts essential to their jurisdiction appear, it must be held not

to exist, Collins vs. McDonald, 258 U.S. 416.

The question of the remedies available to Appellant to compel the United States to continue retirement pay is so bound into the question as to the constitutionality of the statute conferring jurisdiction on the military to try Appellant, that the issues because of their inter-relation should have been determined together in the same action.

CONCLUSION

It is respectfully submitted that the District Court erroneously determined that U. C. M. J. 4(2) was constitutional. Further that the District Court properly should have avoided any determination of the constitutionality of said statute because Appellant, in any event, was court martialed without jurisdiction due to the failure of the Secretary of the Navy to recall Appellant to active duty as required by law.

It is further submitted that while the status of retired officers' pay presents a novel question, nevertheless equitable principles require that said pay be construed to constitute a retirement pension for services rendered and not pay subject to forfeiture after retirement.

The District Court properly ruled that it had jurisdiction to determine the declaratory action on the constitutionality of the statute, but erroneously determined that this jurisdiction should be postponed pending exhaustion of military remedies. Such a determination was based on the erroneous assumption that military

tribunals are courts of general jurisdiction akin to the state judicial systems, when in fact they are special statutory tribunals whose jurisdiction must affirmatively appear.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be reversed with instructions to enter a declaratory judgment that the court martial is without jurisdiction due either to: (1) Failure to recall Appellant to active service or, (2) Because Article 2, Section 4 of the U. C. M. J. is unconstitutional.

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No. 16058

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral, USN, Commandant,
Eleventh Naval District,

Appellee.

APPELLEE'S BRIEF.

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No. 16058

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral, USN, Commandant,
Eleventh Naval District,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

In the Court below, jurisdiction was claimed to exist by the plaintiff under 28 U. S. C. 1651(a) as to the First Cause of Action of the Amended Complaint and under 28 U. S. C. 1331, 1355, 2201, 2202, 2282 and 2284 as to the Second Cause of Action of the Amended Complaint [R. 7, 11, 18]. Plaintiff expressly disclaimed assertion of habeas corpus jurisdiction [R. 5]. The Court below sustained its jurisdiction as to the Second Cause of Action under 28 U. S. C. 1331.

This Court has appellate jurisdiction under 28 U. S. C. 1291.

Statement of Case.

Appellant in July, 1923, entered the United States Naval Academy, Annapolis, Maryland, as a midshipman. He graduated therefrom and was commissioned an Ensign, United States Navy, on June 2, 1927, in the regular component of the United States Navy [R. 43]. He

thereafter served as a commissioned officer of the regular component of the United States Navy, in active naval service on various ships and stations and was promoted from time to time until December 1, 1948 [R. 43, 44].

On July 12, 1948, he applied to the Secretary of the Navy, requesting voluntary retirement and transfer to the Retired List, thereby to be voluntarily retired, effective December 1, 1948. His request was granted by the Secretary and he was transferred to the Retired List of Officers of the Navy effective December 1, 1948, being given the rank of Rear Admiral and thereafter receiving the retired pay of the naval rank of Captain [R. 40, 41, 42]. Nothing in the record indicates that he has ever since December 1, 1948, ceased to be a Retired Officer entitled to receive and receiving pay.

Rear Admiral C. C. Hartman is Commandant of the Eleventh Naval District which has its headquarters at San Diego, California [R. 27, 28]. The Eleventh Naval District consists of the State of Arizona, Clark County of Nevada, and that portion of California which includes San Bernardino, Santa Barbara and Kern Counties and the counties to the south thereof.¹ On April 15, 1957, there were received at Headquarters, Eleventh Naval District, sworn charges under the Uniform Code of Military Justice [R. 27, 28]. These charges alleged that appellant did, on certain dates, which dates were after December 1, 1948, commit certain offenses in violation of that Code [R. 19-23].

The charges were investigated and other preliminary steps were taken [R. 28] and a General Court-Martial

¹We ask the court to take judicial notice of the boundaries of the Eleventh Naval District. See: Federal Register Division, United States Government Organization Manual, 1957-1958, page 177.

was appointed by appellee, Admiral Hartman, for trial of the charges [R. 30, 31].

On May 2, 1957, appellant filed a document in the Court below entitled "In the Matter of the Petition for Writ of Prohibition by Selden G. Hooper." On May 3, 1957, the Court below on its own motion dismissed that Petition with leave to file an Amended Petition [R. 3]. No appeal was ever taken from the dismissal of that original Petition, or the denial of any immediate interlocutory relief it may have demanded.

On May 6 and 7, 1957, appellant was tried before the General Court-Martial, was found guilty of several offenses and was sentenced to be dismissed from the service and to forfeit all pay and allowances [R. 32-34].

On May 15, 1957, appellant filed his Amended Complaint [R. 19].

On May 27, 1957, appellee completed his action as convening authority with respect to the court-martial case and forwarded the record of the proceedings to the Navy Board of Review in the Office of the Judge Advocate General of the Navy [R. 29, 30, 34, 35].

The Board of Review announced its decision on September 10, 1957, and the case was thereafter transmitted to the United States Court of Military Appeals, being docketed therein as No. 11113 [R. 52, 53]. The Court below enter Judgment on May 13, 1958² [R. 59-70]. The Court of Military Appeals announced its opinion and decision on September 26, 1958.³

²The Findings of Fact and Conclusions of Law are published at 163 Fed. Supp. 437.

³We ask this Court to take judicial notice of the opinion which is reported at 9 U. S. C. M. A. 637, 26 C. M. R. 417, and which is printed, for the convenience of the Court, as an appendix to this brief.

Summary of Argument.

1.

THE ENTIRE SUIT SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT FOR LACK OF AN INDISPENSABLE PARTY, AND ON JURISDICTIONAL GROUNDS.

A. THIS POINT MAY BE RAISED NOTWITHSTANDING THAT THERE HAS BEEN NO CROSS-APPEAL.

B. THE SECRETARY OF THE NAVY, WAS AN INDISPENSABLE PARTY, LACKING WHOM, THE ENTIRE SUIT SHOULD ALSO HAVE BEEN DISMISSED ON THAT GROUND.

C. THIS SUIT COULD NOT PROPERLY BE BROUGHT OUTSIDE OF THE DISTRICT OF COLUMBIA.

D. THERE WAS NO JURISDICTION UNDER THE CIRCUMSTANCES TO TREAT THE SUIT AS A PETITION FOR A WRIT OF HABEAS CORPUS.

2.

UNDER THE CIRCUMSTANCES OF THE CASE, IT WAS PROPERLY DETERMINED AS A MATTER OF LAW THAT APPELLANT SHOULD HAVE NO RELIEF IN THE COURT BELOW BECAUSE OF HIS FAILURE TO EXHAUST THE MILITARY APPELLATE REMEDIES AVAILABLE TO HIM.

3.

THE TRIAL AND SENTENCE OF APPELLANT BY GENERAL COURT-MARTIAL WAS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

A. RETIRED OFFICERS OF A REGULAR COMPONENT OF THE ARMED FORCES ENTITLED TO RECEIVE PAY ARE MEMBERS AND OFFICERS OF THE ARMED FORCE CONCERNED AND ARE MILITARY OFFICERS OF THE UNITED STATES, THE SAME AS THOSE ON ACTIVE DUTY.

B. THE PRESIDENT OF THE UNITED STATES HAS THE CONSTITUTIONAL POWER TO TERMINATE THE HOLDING OF MILITARY OFFICE UNDER THE EXECUTIVE BRANCH.

C. RETIRED PERSONS OF REGULAR COMPONENTS OF THE ARMED FORCES OF THE UNITED STATES ENTITLED TO RECEIVE PAY ARE CONSTITUTIONALLY SUBJECTED TO TRIAL BY COURT-MARTIAL FOR OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

ARGUMENT.

1.

The Entire Suit Should Have Been Dismissed by the District Court for Lack of an Indispensable Party, and on Jurisdictional Grounds.

A. This Point May Be Raised Notwithstanding That There Has Been No Cross-Appeal.

At the outset in this case, we are compelled to raise the point regarding the jurisdiction of the Court below and the sufficiency of the parties, which was decided against appellee notwithstanding the fact that appellee prevailed on other grounds.

The Court below concluded that the Secretary of the Navy, who was not served or joined and whose office is located in Washington, D. C., was an indispensable party to any relief under the First Cause of Action and a portion of the Second Cause of Action pleaded. However, the Court also determined that "the Secretary of the Navy was not an indispensable party defendant and defendant C. C. Hartman is a sufficient party defendant" to the extent of entertaining the prayer for declaratory judgment [Conclusion of Law No. 8, R. 66].

It is our position that this last determination of the Court below was erroneous. It is proper at this stage for appellee to assert such error notwithstanding the fact that no cross-appeal has been filed. An almost identical situation recently occurred in *Stroud v. Benson*, 254 F. 2d 448, in which the Secretary of Agriculture and others were sued in the Eastern District of North Carolina. The District Court decided the case in favor of the Secretary on the merits after assuming he was not indispensable, and that its jurisdiction was therefore suf-

ficient. The plaintiffs appealed, and on appeal, the Court of Appeals stated at page 451:

“The jurisdictional question however claims our attention and we are bound to deal with it despite the failure of the Secretary to cross-appeal. *United States v. American Railway Express Company* (1924), 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087; *Langnes v. Green* (1931), 282 U. S. 531, 535, 51 S. Ct. 243, 75 L. Ed. 520; *Jaffke v. Dunham* (1957), 352 U. S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314.”

B. The Secretary of the Navy Was an Indispensable Party, Lacking Whom, the Entire Suit Should Have Been Dismissed on That Ground.

The Amended Complaint originally prayed for a variety of relief including injunction, Writ of Prohibition, etc., but we assume Appellant is satisfied with a Declaratory Judgment alone, inasmuch as the jurisdictional matters are not mentioned in his specification of errors or in his brief.

In addition to grounding jurisdiction upon 28 U. S. C., Section 1331, the Amended Complaint also mentioned at various places Sections 1651, 2201, 2202, 2282 and 2284 of that Title. It is clear beyond argument that none of these provisions are sources of jurisdiction, but they are all procedural statutes which provide additional or ancillary remedies, or certain limiting requirements in cases where there is jurisdiction in the court under some other provision of law. It is so held as to the Declaratory Judgment Act (Secs. 2201, 2202), the Three Judge Court statute (Secs. 2282, 2284), *Van Buskirk v. Wilk-*

inson (C. A. 9), 216 F. 2d 735, and as to the All Writs Act (Sec. 1651(a)).

Petrowski v. Nutt (C. A. 9), 161 F. 2d 938;

Marshall v. Crotty (C. A. 1), 185 F. 2d 622, 626;

In re Commonwealth of Massachusetts, 197 U. S. 482.

Viewed as an application for relief in the form of an extraordinary Writ of Prohibition or Mandamus, the jurisdictional statute, 28 U. S. C. 1331 provides no basis for the suit because it has long been held that such extraordinary proceedings are not "civil actions" within the meaning of the section, and there is no residual common law basis for power to issue such writs in the Federal Courts (outside of the District of Columbia, at least).

Marshall v. Crotty, supra;

McIntire v. Wood, 7 Cranch. 504;

In re Binninger, 3 Fed. Cas. No. 1417;

Cf., Smith v. Whitney, 116 U. S. 167, 175.

Rule 81(b), F. R. C. P., did not change the situation, even though it abolished the Writ of Mandamus, substituting therefor a "civil action" for equivalent relief, because it expressly incorporates only "relief heretofore available by mandamus."

Can a "civil action" be maintained in the present situation? Admittedly, as the Court below found, there is a "Federal question" and a sufficient amount in controversy. As shown above, the Declaratory Judgment Act, the All Writs Act and the Three-Judge Court statute

add nothing, so it avails appellant nothing to limit himself to a demand for only one form of relief or procedure. There must be a basis for jurisdiction shown, and if there is jurisdiction for any of the relief, there would be jurisdiction for all of it. The same principles apply to the requirement of indispensable parties because from the nature of this suit the relief demanded is indivisible: if the superior officer, the Secretary of the Navy, is indispensable at all, he is indispensable altogether for the objects of the suit, and any decree, or procedures enforced against the present appellee would be a complete illusion and would effect nothing so far as protecting the rights of the appellant are concerned.

We do not have here a situation like that where a jurisdiction has been created expressly or by implication by Act of Congress for review in, or appeal to, the various District Courts and Courts of Appeal of the decisions or actions of Federal agencies.⁴ On the contrary, the Administrative Procedure Act is expressly inapplicable to military matters, including courts-martial. 5 U. S. C. 1001(a)(2). Thus immigration cases which are allowed to be brought against inferior officers, where the Attorney General would otherwise be an indispensable party, are allowed on the grounds of an implied, but specific, grant of such review jurisdiction in the Administrative Procedure Act,

Shaughnessey v. Pedreiro, 349 U. S. 48, 53,

and those cases are thus inapplicable to the present situation.

⁴Such as the provisions in, for example: The Social Security Act, 42 U. S. C. 405(g), the Longshoreman's and Harbor Worker's Compensation Act, 33 U. S. C. 921, the Administrative Procedure Act, 5 U. S. C. 1009, or other statutes such as 5 U. S. C. 1031, *et seq.*, granting jurisdiction for review of orders of certain agencies.

Absent such specific statutory provisions, this suit must be governed by general principles developed by a number of cases. In numerous cases where suits were brought against the local government officials of various government activities, the head of the Department concerned has been held indispensable. In others he has been held not to be so, the local officer being sufficient.⁵ In *Colorado v. Toll*, 268 U. S. 228, the object of the suit was to restrain the superintendent of a National Park from enforcing certain regulations upon the conduct of persons in the park, the regulations being allegedly unauthorized. (Suit was in the District of Colorado.) It was held that the superior was not indispensable. In *Knorr v. Miles* (D. Mass.), 60 Fed. Supp. 962, the superior was not indispensable to restrain enforcement of a regulation which would have barred plaintiff's employment with a government contractor. A similar result was reached in *Parker v. Lester*, 112 Fed. Supp. 433, reversed in part by this Court, 227 F. 2d 708, where the Commandant of the Coast Guard was held not indispensable in restraining the enforcement of regulations which would have interfered with the rights of the plaintiffs to contract for employment at the port of San Francisco, within the District of the court. In *Hynes v. Grimes Packing Co.*, 337 U. S. 86, the Secretary of the Interior was held not indispensable, where the Regional Director of the Fish and Wildlife Service for Alaska was before the Court in a suit to restrain the enforcement of regulations which would have affected the fishing rights of private parties. Consistent with these is the famous old case of *United States v. Lee*, 106 U. S. 196, where the

⁵The cases are collected in Moore's Federal Practice, Section 19.16.

indispensable superior officer problem was not discussed, the issues centering on whether the United States itself was indispensable. In that case a suit in ejectment was allowed in the Eastern District of Virginia whereby government employees were ejected from certain land and forbidden to re-enter it, at the suit of the owner, notwithstanding the claim of the employees that they were rightfully there under the authority of the government under a claim that the government had acquired the land. But the court carefully stated that it was not trying the title of the United States (see: *Land v. Dollar*, 330 U. S. 731, 741, Reed, J., concurring).

Very recently in *Murphy v. Benson*, 164 Fed. Supp. 120, the Secretary of Agriculture was held not to be indispensable in a suit brought in the Eastern District of New York to restrain an insecticide spraying program of land including that of the plaintiffs. In the leading Supreme Court case which briefly sets forth the rule to be followed, *Williams v. Fanning*, 332 U. S. 490, the Los Angeles Post Office was stopping mail received there from elsewhere in the country which was intended for a local addressee, and, among other things, returning it to the senders. It was held that the Los Angeles Postmaster was a sufficient party and that the Postmaster General was not indispensable.

On the other hand the superior officer, usually the Cabinet member heading the Department concerned, has been held indispensable in the following cases. In *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, a suit brought in the District of Columbia to compel the issuance of land patents to the plaintiff, and to restrain certain other disposition of public lands, only a subordinate of the Secretary of the Interior was before the Court, the incumbent

Secretary not being a defendant. It was held that the Secretary was indispensable and that the suit could not be maintained against the subordinate. In *Webster v. Fall*, 266 U. S. 507, a suit was brought in Oklahoma to compel a disbursing agent to pay out money contrary to regulations of the Secretary of the Interior. Held: the Secretary was indispensable. Likewise in *Gnerich v. Rutter*, 265 U. S. 388 the Commissioner of Internal Revenue was held to be indispensable in a suit in California to compel issuance of a permit under the Prohibition law.

More recently, in *Carson v. Meador*, 120 Fed. Supp. 260 the Probation Officer of the Southern District of California was sued in an attempt to obtain better parole terms than were granted by the United States Parole Board under an admittedly valid sentence. It was held that the Parole Board in Washington, D. C. was indispensable.

In cases of discharge of government employees it is generally held that the superior is indispensable to a suit to compel reinstatement or to review the discharge.

Blackmar v. Guerre, 342 U. S. 512;

Marshall v. Crotty (C. A. 1), 185 F. 2d 622;

Daggs v. Klein (C. A. 9), 169 F. 2d 174.

In the most recent case, the plaintiffs sued with the object, in effect, of compelling an increase in the crop price supports put in effect by the Secretary of Agriculture. It was held that the Secretary was indispensable.

Stroud v. Benson (C. A. 4), 254 F. 2d 448.

What is the rule to be followed? *Williams v. Fanning*, *supra*, states it as follows, at page 493, where it is stated that the superior officer is indispensable where: "the decree granting the relief sought will require him to take action,

either by exercising directly a power lodged in him or by having a subordinate exercise it for him." Under all the cases the superior is not indispensable however if the relief sought is only prohibitory in nature and does not require an act on the part of either the subordinate before the court or the superior. Where the only means of acting is through a subordinate who must be within the jurisdiction of the court, in order to act, the order of the court against the subordinate effectively "binds" the superior as a practical matter,⁶ even though the superior is not before the court to be *legally* bound⁷ to the court's decision.

In order to determine if the superior officer, in this case the Secretary of the Navy, is indispensable, as stated in *Stroud v. Benson, supra*, p. 452:

"One must look to the nature and effect of the proceeding and not merely to the names of the titular parties."

The general scheme of initiating and carrying out courts-martial proceedings is set forth in the Uniform Code of Military Justice, 10 United States Code, Sections 801-940, and the Presidential Regulations promulgated thereunder.⁸

⁶This illustrates that the actual holding in *Williams v. Fanning* goes somewhat beyond the rule stated. Suppose, in that case, the Postmaster General decided to (1) abolish all mail service to Los Angeles? or (2) to identify the particular mail and stop it at the various places from which sent rather than when received at Los Angeles? The Supreme Court apparently recognized these as practical impossibilities.

⁷Unless, of course, there is some special statutory implication, as in *Shaughnessey v. Pedreiro*.

⁸Act of May 5, 1950, 64 Stat. 107, formerly 50 U. S. C. 551-736, reenacted in New Title 10, U. S. C., 70A Stat. 36; the Presidential Regulation is the Manual for Courts-Martial, United States, 1951, referred to as "MCM"; promulgated as Executive Order 10214, February 8, 1951, 3 CFR, 1951 Supplement.

It is clear that since May 27, 1957, the Court below lacked the necessary and indispensable parties without whom the suit could not be maintained. Even if we assume, for the moment, that prior to May 27, 1957, when the charges were preferred, investigated, brought to trial, and the record prepared and reviewed as required by military law, the Appellee because of his connection with the matter was a sufficient subordinate of the Secretary of the Navy with respect to it so that the decree of the Court could effectively "expend itself" and thus, in effect, bind his superior, nevertheless, since May 27, 1957, when appellee made his order of approval of the proceedings and forwarded the court-martial record to the Judge Advocate General of the Navy, he became and has remained an entire stranger to any further proceedings in the court-martial case, or any action to be taken if the sentence becomes final. There must be approval by the Board of Review, the Court of Military Appeals and the President before the findings and sentence are final, and the sentence ordered into execution. (10 U. S. C. 866(b), 867(b)(1), 871(a). See: *Runkle v. United States*, 122 U. S. 543.) The dismissal, if and when it is to be effected is by an order of execution published by the Secretary, or the Department of the Navy on his behalf. (See: MCM, pars. 90b(2) and 107.) The entry of it would be upon appellant's service records which are kept in the Bureau of Naval Personnel at the Department (see: 10 U. S. C. 5131, 5132), and any action to cause his pay to stop would be done at the same place, and probably be communicated to the Navy finance establishment at Cleveland, Ohio, from where appellant's pay is presently disbursed. Plainly appellee has nothing to do with these things. The sentence does not require appellee or anyone else to presume to interfere with any property right, or with the exercise of any

personal right of appellant, the locus of which could be said to be within the district of the Court below, or, under the command of appellee. On the contrary, appellant's right to continue receiving his pay, his right to remain a retired officer of the Navy, his right not to be separated therefrom with the dishonorable characterization of dismissal by general court-martial, are incidents of his relationship and status with the United States itself.

Since the situation must be considered as a final judgment, the relations of the parties from the inception of the charges up to May 27, 1957, do not make any difference. But it must be observed that, absent facts which would support habeas corpus jurisdiction, under the rules of the applicable cases, the Secretary of the Navy was an indispensable party even then. The reason for this lies in the fundamental character of the procedure in the military jurisdiction. As to a person on ordinary active duty status in an Armed Force, the exercise of court-martial jurisdiction is not limited by reference to the "State" or "District" where the crime was committed because the jurisdiction is based upon the *status* of the accused person, rather than the *place* where he is or where the offense occurred. Rather, the question of who, or which entity, is to exercise the jurisdiction and proceed with a case is referable to, and determined by, generally, the organization, Armed Force, or "chain-of-command" in which an accused has his status. Thus the trial and review of a court-martial case is within the Armed Force of which an accused is a member, as a general rule. (10 U. S. C. 817, see: MCM, pars. 4g(1) and 13.) Within the Armed Force concerned, charges against an active duty member are dealt with through the echelons of command of which the accused is a member. (MCM, pars. 31, 32f, 33i.) A retired officer such as appellant is how-

ever not a member of any "unit" or "organization," in the ordinary active duty sense, inferior to the Department concerned. This situation is provided for however. MCM, paragraph 31c reads:

"In exceptional cases in which the accused is not, strictly speaking, under the command of any military authority inferior to a particular Department, the general principles of this paragraph (31) are applicable; but the charges may, according to the particular circumstances, be forwarded either to the appropriate Department or to the area command in which the accused may be"⁹

In the appellant's court-martial case, the Secretary left the matter of initiating the proceedings in the hands of appellee, as commandant of the "area command" wherein appellant was located. But the Secretary was not legally obliged to do so; he could have retained the case and convened the court-martial himself if he chose. (10 U. S. C. 822(a)(2), 822(b).) Thus the case is different from *Williams v. Fanning*, because an injunction against appellee would not stop the Secretary of the Navy from convening a court-martial elsewhere, as a practical matter. Thus any decree or injunction entered against appellee would be illusory and would be actually nothing more than an advisory opinion between parties no longer in substantial controversy.

⁹This is a paraphrase of the same provision of the 1928 edition Manual for Courts-Martial [Ex. O. 4773], the predecessor the present Manual. Paragraph 30 of the 1928 Manual contains practically identical wording, except that immediately after "Department" is inserted: "for example, retired personnel not on active duty, or military attaches"

C. This Suit Could Not Properly Be Brought Outside of
the District of Columbia.

The trial courts of the District of Columbia, presently the District Court for that District, have always had two advantages in dealing with suits seeking relief against government officials. First, they possess not only the same Federal jurisdiction as other Federal courts, but they also have the general jurisdiction derived from the Kings Bench, as exercised in the State of Maryland at the time of the cession of the District. This included the ancient powers to issue extraordinary prerogative writs against officials.

Kendall v. United States, 12 Peters 524;

United States v. Schurz, 102 U. S. 378;

See: *Smith v. Whitney*, 116 U. S. 167, 175.

Particularly the issuance of mandamus against officials by those courts has become accepted practice.

See: *Clackamas County v. McKay*, 219 F. 2d 479,
vacated as moot, 349 U. S. 909.

Second, the "official residence" of heads of departments is Washington, D. C., so that there is obvious *in personam* jurisdiction by personal service.

Butterworth v. Hill, 114 U. S. 128;

But see: *Miley v. Lovett*, 193 F. 2d 712.

Thus it would appear from recent cases that appellant could bring suit in the District of Columbia in the District Court to review his court-martial sentence on grounds of lack of jurisdiction, if it should become final.

Harmon v. Brucker, 355 U. S. 579;

Jackson v. McElroy, 163 Fed. Supp. 257.

Also, he is expressly allowed to sue the United States in the Court of Claims for his pay and raise the same issues.

See: *Allen v. United States*, 91 Fed. Supp. 933;

Fly v. United States, 100 Fed. Supp. 440.

It appears that in between the situations where a suit so affects the sovereign that the sovereign itself must be a party, and the situations where suit can be brought against any individual subordinate for relief (as in habeas corpus cases, which are really a mode of review; see: *Larson v. Domestic and Foreign Corp.*, 337 U. S. 682, 690), there is an in between situation where under one rationale or another, suits are allowed against the proper party in the District of Columbia but not elsewhere. Professor Moore in his "Federal Practice" at Section 19.16 after discussing *Williams v. Fanning* states:

"A practical consideration, not stressed in the *Williams* case, but long recognized as important in this field, has been whether the character of the subject matter of litigation and the type of officer before the court makes it reasonable to proceed to an adjudication of the issues without forcing the plaintiff into a distant forum to litigate with the superior. The practical issue is whether the citizen must go to the seat of the government; or whether government must come to him. Only where the subject matter of litigation has considerable governmental importance—rises considerably beyond routine matter, or where action is sought which only the superior can give, as the issuance of a land patent or the disbursement of funds under his control, should the citizen be forced to go to the government, normally to the District Court of the District of Columbia."

The practical reasons for confining such exceptional jurisdiction to a single court at the seat of the government, is partly a matter of convenience, in cases where suit elsewhere would be a disproportionately great inconvenience to the government. But a strong additional reason is that where the subject of a suit has "considerable governmental importance" or rises beyond the "routine" particularly, for example, where a court would have before it the validity of technical and delicate personnel status relationships between an individual officer and the government, matters which by their nature demand a uniformity of treatment throughout the government without regard or reference to place, State, District, etc., proper judicial administration favors the avoidance of an "inverted triangle" situation where differences of opinion among the Districts and Circuits could create territorial diversity of decision in types of cases where it is particularly undesirable.¹⁰ While, in theory, all "Federal" cases could be appealed to the Supreme Court to obtain uniformity of decision in the end, as a practical matter considerable diversity in detail remains. In those special situations where a lesser degree of such diversity is desirable the only way it can be achieved is to confine the particular subject matter to a particular line of inferior courts, whose decisions, at least, will be binding on the whole government through its highest officials and will, presumably, be consistent with themselves. There is nothing unusual about the reason advanced here; in reality it is the same reason, but in greater degree, as was given for the necessity of having a system of Federal Courts in the first place for the trial of "Federal" cases, rather than leave such cases to the

¹⁰For example: compare *Jackson v. Taylor*, 234 F. 2d 611, aff'd 353 U. S. 569, with *DeCoster v. Madigan*, 223 F. 2d 906.

diverse decisions of the courts of the states. Alexander Hamilton, in No. 80 of the Federalist Papers, wrote:

“ . . . The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”

Also see: *In re Tarble*, 13 Wall. 397, 403.

D. There Was No Jurisdiction Under the Circumstances to Treat the Suit as a Petition for a Writ of Habeas Corpus.

Appellant in the amended complaint expressly disclaimed any reliance upon habeas corpus jurisdiction to sustain his case. But if the facts make out a case for habeas corpus, it would seem that the disclaimer might be disregarded as a mere conclusion from the facts. In any case, it is clear that, if the jurisdictional facts exist, then there is jurisdiction, regardless of the disclaimer, and vice-versa if the jurisdictional facts did not exist: jurisdiction could not exist by agreement.

Generally in order to sustain habeas corpus, the petitioner must be in custody or under detention, at least so that the respondent served with the writ or process can obey the order to produce the “body” in court.

Wales v. Whitney, 114 U. S. 564;

Biron v. Collins, 145 F. 2d 759.

Wales was Surgeon General of the Navy, who was ordered by the Secretary of the Navy, Whitney; “You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington,” pending court-martial. It was held that the mere order alone, under the circumstances, did not put Wales under such custody

or threat of custody as would support a Writ of Habeas Corpus. In *Biron v. Collins* the petitioner was ordered by his draft board, in Alabama, to report for "civilian work," in lieu of military service, in Colorado, and the respondent was the local draft board in Alabama. It was held that respondent had no possible custody over petitioner; and that under the cases, the only proper party who could threaten to hold petitioner in custody so as to be a sufficient respondent was the authority in Colorado to whom the petitioner had the duty to report, as in the similar case of a person inducted into the military service: the proper party is the Commanding Officer to whom there is the duty to report for service.

On the other hand, where a person already is in the status of "member" of a military unit or organization on full active military duty,¹¹ it has been held that the duty status itself is sufficient to be considered custody, without actual physical confinement being necessary.

This point is assumed so often in habeas corpus cases reviewing Selective Service inductions for example, that it is difficult to find it discussed. In general, habeas corpus is the "post induction remedy," without reference to physical custody.

United States v. Estep (C. A. 3), 150 F. 2d 768,
rev'd on other grounds, 327 U. S. 114;

Witmer v. United States, 348 U. S. 375;

Peck v. Carpenter (D. C., Cal.), 120 Fed. Supp.
560.

In the military service, persons on "active duty" are subject to obligations unknown to persons not on such

¹¹Defined at 10 U. S. C. 101(22); court-martial jurisdiction over this category is granted by 10 U. S. C. 802(1).

duty. The principle characteristic of the service is that when a person is on active duty he is assigned to a "unit" or "organization" and given a place of "duty" and a time when to be on such duty. Unlike in civilian employment, and in civil life generally, the obligation of being at and remaining at the place of duty at the proper time, all the time, is enforceable by penal sanctions for its violation. (See for example: 10 U. S. C. 885, 886, 887, 913.¹²) This is but a special facet of the general obligation that, in the military, one must obey orders under pain of penal sanctions. Thus, in matters entirely unconnected with any restraint imposed as part of any court-martial proceeding, one's everyday freedom of movement is ordinarily limited to the "unit," "base," "station," "ship," etc., where one has his duty.

Thus, the commanding officer who has in his power such everyday control over a petitioner in the ordinary course of duty, is a sufficient party to respond to the court's orders.

See: *Boscola v. Bledsoe*, 152 Fed. Supp. 343, aff'd (C. A. 9), 245 F. 2d 955.

In our present case, it is very clear that appellant as a retired Rear Admiral was not assigned to, under, or on duty with the Eleventh Naval District, or otherwise under the command of appellee in the sense that active-duty members of the Navy in the Eleventh Naval District are under appellee's command. Perhaps the Secretary of the Navy could delegate authority to appellee to attempt to exercise command over appellant at the time of the court-martial. Suffice to say that this was not done. In none of the other ways customary in the mili-

¹²Compare 18 U. S. C. 3146.

tary was appellant bound to report to appellee; nor did he need appellee's permission or authority, or travel or transfer orders of any kind, should he decide to remove himself to some other place in the country.

While appellant can be termed a "member" of an Armed Force of the United States, his membership is "at large" as it were, since he is a part of no unit, or organization less than the Department of the Navy itself. As for his "place of duty" in his retired status, its limits are no less than the whole of the United States itself, or the whole world for that matter. There is no way for appellee to respond to a Writ of Habeas Corpus, because under the relationships stated, appellee has no control over the movements of appellant and indeed has no way of knowing whether appellant remains within this part of the country, unless informed by his superior, the Secretary of the Navy. Suppose appellant were at this moment in New York City, and there is nothing in the record to show he is not, how could appellee possibly be held to have him in custody? There is no showing here that appellee has ever retained any command control, even if he ever had it over appellant in the first place, wherever appellant might travel; thus the case is different from *Ex parte Endo*, 323 U. S. 283. Plainly, the only sufficient respondent who could guarantee the custody of appellant, wherever he might be, is the Secretary of the Navy (or the Secretary of Defense) himself who can be sued in Washington, D. C., in the District Court.

Day v. Wilson (C. A., D. C.), 247 F. 2d 60;

Girard v. Wilson (D. C., D. C.), 152 Fed. Supp. 21, rev'd in part, 354 U. S. 524.

From the record in this case it is apparent that at no time was any attempt made to impose, confinement, arrest, restriction, or any other such limitation upon appellant, before or after the court-martial trial. He was served with a copy of the charges prior to trial and was ordered to attend, and he did so voluntarily. Afterwards, the sentence not extending to death or imprisonment, there could be no further occasion for any restraint.

There can be no threat of any increase of the court-martial sentence in any future action that may be taken with respect to it, because it could not be increased to include any confinement where none was adjudged.

United States v. Stene, 7 U. S. C. M. A. 277;

United States v. Kelley, 5 U. S. C. M. A. 259.

At this stage of the case, appellant is in no better position than was the petitioner in *United States ex rel. Goodman v. Roberts* (C. A. 2), 152 F. 2d 841. In that case the petitioner, a draftee, was transferred out from under the command of the respondent before the writ was served. Held: the writ would not lie because the petitioner was not in the respondent's custody. The same result must occur here.¹³

¹³Query: suppose appellant had not attended the court-martial arraignment and trial voluntarily? Courts-martial use traditionally criminal procedure, even if the sentence does not extend to death or confinement; thus the accused's presence is absolutely necessary at the inception of the proceedings, when the court-martial is sworn, during the challenges and through the arraignment. (See MCM, App. 8, pp. 501-508.) Thus physical custody may have been used had appellant failed to attend.

2.

Under the Circumstances of the Case, It Was Properly Determined as a Matter of Law That Appellant Should Have No Relief in the Court Below Because of His Failure to Exhaust the Military Appellate Remedies Available to Him.

Even aside from the jurisdiction, venue and indispensable party questions discussed above, appellant should not be allowed to maintain his suit at the present time even were it brought in a court which would otherwise have jurisdiction. Of course appellant is attacking the constitutionality, as a matter of law, of 10 U. S. C. 802(4), as generally applicable, not only as applicable to himself. If this were a habeas corpus case and if appellant were in custody or detained under a sentence providing for imprisonment, or some other form of custody, actual or constructive, or if he were in any way at the present time being deprived of any present right of any kind, then there would be grounds for saying that, under the most recent cases, exhaustion of military appellate remedies in the court-martial case would be unnecessary.

Toth v. Quarles, 350 U. S. 11;

Guagliardo v. McElroy (C. A., D. C.), F. 2d
....., No. 14304, Sept. 12, 1958;

Reid v. Covert, 354 U. S. 1.

The whole difference between this case and the cases cited however is that in those there is imprisonment pending trial, or imprisonment under a sentence providing for such. The petitioners were of course being deprived of a valuable present right, to secure which, the military appellate remedies were deemed to be inadequate by the nature of the issue, allowing immediate resort to habeas corpus. In the present case however appellant has at no time been deprived of his liberty, or of anything else. How can he

be said to be deprived of personal liberty if he has the liberty to live wherever he desires, in the whole country, as discussed above? Furthermore, appellant can lose nothing at all of his pay or his status as a retired officer until the sentence of the court-martial is finally approved and ordered into execution. (10 U. S. C. Sec. 857(c).)

As will be seen from the opinion of the Court of Military Appeals, the court-martial case is not finally disposed of, but the case has been returned to a lower step in the Court-Martial Appellate hierarchy for further proceedings under 10 U. S. C. Sections 861 and 864.¹⁴

This case should be governed therefor, so far as exhaustion or remedies is concerned, by other case authorities which involve property or other rights, instead of deprivation of personal liberty. It is held that even where constitutional questions are raised the remedies provided must be exhausted before resorting to court in such cases. (*Allen v. Grand Central Aircraft Company*, 347 U. S. 535; *Aircraft and Diesel Corporation v. Hirsh*, 331 U. S. 752; see: *Burford v. Sun Oil Company*, 319 U. S. 315, rehear. den. 320 U. S. 214.) Absent the considerations in *Toth v. Quarles*, *supra*, and like cases, the doctrine of exhaustion of remedies applies with full force to court-martial cases.

Gusik v. Schilder, 340 U. S. 128.

¹⁴As will be seen from the authorities cited by the Court of Military Appeals there are in courts-martial procedure not one but *three* "trials of the fact": not only the court-martial but also the convening authority and the Board of Review must be convinced "beyond reasonable doubt," as well as of the legal sufficiency of the evidence. The Court of Military Appeals was satisfied on the legal question; however, it was dissatisfied with the conduct of the second step, that is, the convening authority's consideration of reasonable doubt and appropriateness of sentence. It should be noted that the convening authority and the Board of Review have powers over the appropriateness of the sentence which are unknown to appellate tribunals outside of the military.

3.

The Trial and Sentence of Appellant by General Court-martial Was Not in Violation of the Constitution of the United States.

- A. Retired Officers of a Regular Component of the Armed Forces Entitled to Receive Pay Are Members and Officers of the Armed Force Concerned and Are Military Officers of the United States, the Same as Those on Active Duty.**

Aside from the preliminary questions of indispensable parties, jurisdiction and exhaustion of remedies, we have no doubt that the court-martial sentence pronounced against appellant, to be dismissed from the Service and to forfeit all his pay and allowances is constitutional. We have in this connection the unanimous opinion on the point recently rendered in the court-martial case by the United States Court of Military Appeals which is printed in the Appendix to this Brief. It would be redundant to repeat the same arguments and authorities which appear in that opinion, and we adopt it in full and refer this Court to it for argument on this point.

There are some additional observations which should be made, however, in addition to the ground covered by the Court of Military Appeals. The status of retired officers of the Armed Forces as being properly subjected to the military jurisdiction is made clear beyond any doubt when one considers the history of the establishment of the military retirement system. We refer the Court to a recent study of the status, composition, character and traditions of the Armed Forces of the United States, the recent book, "The Soldier and the State" by Professor Samuel P. Huntington, Harvard University, 1957. While this is not a strictly "legal source" we ask the Court to

take notice of it and certain matters contained therein which illustrate the history of the status of retired officers.¹⁵

In discussing the personnel situation in the regular Armed Forces of the United States prior to the Civil War, Professor Huntington makes the following comments on page 207 of his book:

“* * * The absence of a retirement system in the Army and the Navy caused officers to hang on to their posts until they died in their boots, holding up the advancement of juniors. The Navy received a limited retirement system in 1855, but the Army had to wait until after the Civil War.”

In a further discussion in the chapter entitled “The American Military Profession,” at page 246 of his book, Professor Huntington states as follows:

“Prior to 1855 no retirement system existed in either the Army or Navy. In that year, however, Congress, persuaded of the necessity for cleaning out the upper ranks of the Navy, created a ‘reserved list’ for officers incapable of duty. In 1861 Congress approved a continuing scheme of compulsory retirement of Army and Navy officers for incapacity and introduced the first provisions for voluntary retirement. Subsequent legislation in the 1860’s and 1870’s required the compulsory retirement of naval officers at the age of sixty-two and attempted to stimulate voluntary retirements by increasing retirement benefits. Legislation in 1862 and 1870 provided that Army officers could retire on their own application after thirty years of service or by compulsion at the discretion of the President. Manda-

¹⁵This book has been reviewed in 71 *Harvard Law Review*, 391 (Dec. 1957) and 67 *Yale Law Journal* 164 (Nov. 1957).

tory retirement at the age of sixty-four, a reform long advocated by professionally minded officers, was finally enacted by Congress in 1882.²⁰ By the end of the century both services had adequate professional systems of superannuation.”

“²⁰Act of Feb. 28, 1855, 10 Stat. 616; Aug. 3, 1861, 12 Stat. 289. For the Navy: Acts of Dec. 12, 1861, 12 Stat. 329; July 16, 1862, 12 Stat. 587; July 28, 1866, 14 Stat. 345; July 15, 1870, 16 Stat. 333; March 3, 1873, 17 Stat. 547, 556; March 3, 1899, 30 Stat. 1004. For the Army: Acts of July 17, 1862, 12 Stat. 596; July 15, 1870, 16 Stat. 317, 320; June 30, 1882, 22 Stat. 118; Emory Upton, ‘Facts in Favor of Compulsory Retirement,’ United Service, 11 (March 1880), 269-288, III (December 1880), 649-666, IV (January 1881), 19-32.”

The original Act of February 28, 1855, 10 Stat. 616 which first established the “reserved list” in the Navy originated as Senate Bill No. 568, a “Bill to promote the efficiency of the Navy,” in the 33rd Congress, 2d Session. The Bill was strongly debated in the House of Representatives before being finally passed,¹⁶ and there was considerable opposition expressed to it on various grounds, among them being that it would deprive officers of their “rights.”

Prior to that time, officers of advanced age were actually not given any strenuous duties and were allowed to stay on shore practically the same as if they had been retired.

Due to dissatisfactions and deficiencies under the retirement procedure used under the 1855 law, Congress modified it in the Act of January 16, 1857, 11 Stat. 153.

Finally, with the Act of August 3, 1861, 12 Stat. 287, 290, 291, Congress enacted the system of retirement

¹⁶Congressional Globe, 33rd Congress, 2d Session, pages 708 to 714.

which was the beginning of the pattern which exists today in the Armed Forces. The retirement provisions of the 1861 Act were only passed however after considerable debate. They were finally enacted as consolidated in the Bill entitled "A Bill providing for the better organization of the military establishment," Senate Bill No. 3, 37th Congress, 1st Session. The purpose of the Act was to recognize legally what was in actually the fact: that many, if not the majority of the officers of the highest ranks of both the Army and the Navy were beyond an age and length of service at which they were capable of useful service, at that time, under strenuous wartime conditions; and that there was no use keeping every officer all his life theoretically liable for full service and to be paid for such status when it was so well known that those who were too old could render only limited services, if any at all. An exception however was made for those officers who were over the proposed age limit, but who were nonetheless able so that they could be called to duty or retained on duty.¹⁷

Strenuous opposition was voiced however to the very idea of having a retired list for the Army.¹⁸

However, Senator Henry Wilson of Massachusetts succinctly stated the reason for the Bill, as it related to the Army:

"The truth is, and if you take the Army Register, and examine it carefully, you will find it so, that as you approach towards the head of the Army, your officers are paralyzed by age."¹⁹

¹⁷A familar example is Lt. General Winfield Scott who was in his 70's but nevertheless was Commanding General of the Army for a substantial time at the beginning of the Civil War.

¹⁸Particularly by Senator John P. Hale of New Hampshire. See Congressional Globe, 37th Congress, 1st Session, pages 158, 161.

¹⁹*Id.*, page 162.

And again, he stated:

“The senator says that Majors in the Army are before the enemy to-day commanding divisions . . .

“It is because your old officers of higher Command are unable to go into the field and take command. We have several officers—a large number in proportion to our Army—who are utterly incapable to go into the field; men from 70 to 85 years of age, worn out by disease . . .

“ . . . I think, by all means, these brave and true old officers who are unable to serve the country, should be placed quietly, peacefully, and honorably aside with a reasonable compensation, which I do not believe this nation will grudge; and that captains and majors, men who are to-day 60 years of age, who have served as captains 20 or 30 years; men, however, of vigor, may come forward and take the command of regiments or take their proper places with the Army of the country in the field. . . .”²⁰

If we take the situation in the Navy prior to 1855 and the Army prior to 1861 when there were no retirement laws, manifestly, a regular Army Officer was subject to the military law like all other officers for his whole life unless he either resigned from the Service completely or was dismissed in the very manner of proceeding which appellant contests in this litigation. Suppose for example, Congress tomorrow repealed all the retirement laws and henceforth retained all regular officers in the military service on the active list for all their lives? Could it be seriously disputed that they would not be subject to court-martial jurisdiction? Admittedly, retired officers have duties of a very limited character, as pointed out else-

²⁰*Id.*, page 163.

where, which amount to substantially nothing more than drawing their pay every month and making known their location, presumably so that the pay can be dispatched to the proper address. In exchange for the fact that these duties are quite limited, the amount of pay is less than the full active duty pay, being not more than a maximum of 75 per cent of the basic pay. (See: 10 U. S. C. Secs. 1401, 6325(b)(2), 6326(c)(2), 6330(c), 6381(a)(2), 6383(c)(2), 6390(b)(2), 6396(d)(2), 6398(b)(2), 6399(c)(2), 6400(b)(2).)

It is to be observed that the mandatory retirement age set in the Civil War legislation was accompanied by the original provision subjecting retired officers to general courts-martial in the very same Act. It is very clear from the legislation and its history, however, that it was not contemplated that an officer ceased to be an officer of the military service upon his becoming retired although it was generally agreed that, above the mandatory limits, general military duties would not be required except in those instances specifically provided for. The limits themselves are of interest since it shows that, at all events, an officer was considered able for full active duty below that age.

Much has been added to the retirement laws of the services at the present day. In addition to the mandatory age and service limits which are substantially as first established (10 U. S. C. Secs. 3883-3886, 6390, 8883-8886), there has developed to the present time provisions of law which allow retirement of officers at much lesser ages and lesser lengths of service. These were primarily the result of the Great World Wars at the end of which the Armed Forces had many more officers of high ranks than were necessary for peacetime active

service. There also have been established retirement laws for enlisted persons based upon completion of 20 to 30 years' service (10 U. S. C. Secs. 1293, 1305, 3914, 6326, 8914). In the Navy and Marine Corps there is a hybrid form of retired status called the "Fleet Reserve" the eligibility for which requires attributes of service similar to those required for retirement (10 U. S. C. Secs. 6330, 6331).

For officers the most often used provisions of law since World War II have probably been those which allow officers to retire at the end of 20 years' service upon their application in the discretion of the Department concerned (10 U. S. C. Secs. 3911, 3912, 6323, 8911, 8912). It was under the predecessor version of Section 6323 that appellant applied for and was granted his retirement.

The point is this: can it possibly be said to be unconstitutional to have laws whereby persons who have spent all their adult lives in the military service, after a military education, but who are allowed to transfer to the limited status of "retired," being eligible therefor at an age which could be as low as 40, to receive pay in excess of 50 per cent of the base pay for the rank involved, continue to be subject to at least those provisions of military law which require adherence to certain fundamental standards of conduct, even if actual day to day attendance at duty is not required? Clearly those provisions of law which allow officers and enlisted men to retire after 20 years of service (or to be transferred to the "Fleet Reserve" at the end of the same length of service) do not contemplate that a person so transferred is not under an obligation to keep himself morally fit for further service to his country in his military rank and status. The case was eloquently stated by President Woodrow Wilson in the Veto Mes-

sage which is printed at length in the Court of Military Appeals Opinion in the appendix to this brief.

Perhaps it could be argued that Congress should change the laws so that after a retired officer reaches some mandatory upper age limit such as 60, 65 or even 70, he should thereupon become and be treated as a "mere pensioner" of whom no further military service is to be expected and whose pay thenceforth becomes a true annuity, or vested property right. That only serves to illustrate, however, that a person of the age and status of appellant both at the time of his retirement and at the time of the offenses and his court-martial trial was not to be considered a "mere pensioner."

Because it may be of interest to the Court to know the actual extent of the present jurisdiction under 10 U. S. C. Section 802(4), and the closely related provisions Section 802(6) which covers the "Fleet Reserve" and "Fleet Marine Corps Reserve," evidence was put into the record in the Court below in certificate form as to the approximate average numbers of persons in those categories in each Armed Force. The dates on which the figures were obtained vary from June to December, 1957 but from the nature of the categories it may be assumed that the numbers are relatively constant without great change. Thus we may list the numbers of persons who are retired regulars of the Armed Forces as follows, by Armed Force:

Army	—	58,453
Navy	—	56,025
Marine Corps	—	9,502
Air Force	—	17,056
Coast Guard	—	8,019

And for the Navy and Marine Corps, the numbers of Fleet Reserve and Fleet Marine Corps Reserve are:

Navy	—	20,871
Marine Corps	—	1,782

In comparison with this relatively small total of around 170,000 persons we may note that the presently authorized active strength of the Armed Forces is 5,000,000.²¹ And the Court might also take judicial notice that since 1950 the actual strength of the active Armed Forces has varied between $3\frac{1}{2}$ and $2\frac{1}{2}$ million persons.²² The categories of 10 U. S. C. 802(4) and 802(6) therefore could be described as a small group of fully professional military personnel of uniformly long active service who have devoted long careers to service in the Armed Forces. The numbers of persons who would be subject to jurisdiction under 10 U. S. C. 802(5), which concerns reservists while actually hospitalized in an Armed Forces hospital, is unavailable, though quite small, due to the nature of the category: the jurisdiction exists only while actually in the hospital.

B. The President of the United States Has the Constitutional Power to Terminate the Holding of a Military Office Under the Executive Branch.

The end result of the proceedings against appellant, if the sentence to dismissal from the Service is finally carried out, will be to terminate his status under the Government as an officer. It has been a settled principle ever since 1789 that, under his constitutional powers, the

²¹64 Stat. 408 as amended by 71 Stat. 208.

²²United States Bureau of Census, Statistical Abstract (1957), page 240.

President can terminate the office of any officer under the Executive Branch.

Myers v. United States, 272 U. S. 52.

At least the power cannot be doubted unless some specific exception to it is established by Congress such as for example of restriction upon removal of quasi-judicial officers of independent agencies.

Wiener v. United States, 357 U. S. 349.

So far as officers of the Armed Forces are concerned, the only statutory restriction Congress has ever imposed upon the President's prerogative was in the Act of July 13, 1866, 14 Stat. 92, which is now codified in 10 U. S. C. 1161, which specifies: "no commissioned officer may be dismissed from any armed force except—(1) by sentence of general court-martial" (see *Myers v. United States*, *supra*, pp. 160, 165). Prior to the passage of that statute, the Presidential power of dismissal had been exercised on numerous occasions.

Myers v. United States, *supra*, p. 201.

The only real issue that has ever been raised about 10 U. S. C. 1161 and its predecessors is whether Congress even has the power to pass such a statute, as a limitation on the President.

See: *United States v. Perkins*, 116 U. S. 483.

Obviously, the statute can act, if at all, only as a limitation upon what is otherwise an inherent power of the Executive. Therefore, how can it possibly be unconstitutional for the President to exercise his power under the strict procedure prescribed by statute, that is, by General Court-Martial, when he could validly do so under his inherent powers if there were no such statute? So far

then that appellant is an officer and member of the Armed Forces, that membership can be terminated subject only to the specific limitations prescribed by Congress.

See: *Schustack v. Herren*, 234 F. 2d 134.

Traditionally, a "dismissal from the Service" for an officer of the Armed Forces has meant something more than a mere termination of, or separation from, his office, since the term imports the same characterization of dishonor as is included in a dishonorable discharge given to an enlisted person.

United States v. Alley, 8 U. S. C. M. A. 559, 25 C. M. R. 63;

United States v. Bell, 8 U. S. C. M. A. 193, 24 C. M. R. 3;

United States v. Ellman, 9 U. S. C. M. A. 549, 26 C. M. R. 329.

Both kinds of "dismissal" however have always been equated; as is illustrated by the statutory provision which provides that an officer dismissed by order of the President may within a certain time demand a trial by General Court-Martial upon the grounds of his dismissal. (Act of March 3, 1865, Sec. 12, 13 Stat. 489; now reenacted as 10 U. S. C. Sec. 804.)

It was no doubt the grave effects of Presidential exercise of the power of dismissal by order alone which impelled Congress to add the limitation of a right to trial by General Court-Martial, with its comparatively elaborate degree of procedural protection for the rights of the officer concerned. It is difficult to see upon what constitutional grounds, however, it could possibly be asserted that a General Court-Martial, with its full protection of criminal trial procedure, is an unfit tribunal to try the

issue of dismissing an officer from the Service. It is certainly not less satisfactory, procedurally, than other modes provided for discharge or dismissal of government employees.

In conclusion, we think that the constitutionality of the dismissal and forfeiture of pay of appellant by sentence of General Court-Martial cannot be doubted. Certainly, if the office can be taken away, the pay which appertains to it can likewise. It has been held that the loss of office by a retired officer carries with it the loss of the pay.

Allen v. United States, 91 Fed. Supp. 933.

C. Retired Persons of Regular Components of the Armed Forces of the United States Entitled to Receive Pay Are Constitutionally Subjected to Trial by Court-Martial for Offenses Under the Uniform Code of Military Justice.

As we have stated previously we think the Court of Military Appeals in its Opinion has well covered the reasons for the existence of court-martial jurisdiction which we do not repeat in this brief. We would merely note however that the most recent Supreme Court cases on this general subject, *Toth v. Quarles*, 350 U. S. 11 and *Reid v. Covert*, 354 U. S. 1, dealing respectively with 10 U. S. C. Sections 803(a) and 802(11), are hardly in point when considering the constitutionality of Section 802(4) and (6), even when extended by the recent divided decision of the Court of Appeals of the District of Columbia in *Guagliardo v. McElroy*, *supra*.

On the other hand, this Court has recently reaffirmed the constitutionality of the provision which is now found in 10 U. S. C. Section 802(7). (*Lee v. Madigan*, 248 F. 2d 783, cert. gr. 356 U. S. 911.) By inferential dictum

even Justice Black would uphold the power asserted in 10 U. S. C. Section 802(10).

Reid v. Covert, supra, pp. 33-35.

And likewise at page 23 his Opinion states that:

“There might be circumstances where a person could be ‘in’ the Armed Services . . . even though he had not formally been inducted into the military or did not wear a uniform.”

From all that we have said, the case for jurisdiction of retired officers is incomparably stronger than for jurisdiction over military prisoners or over employees overseas.

Appellant relies so heavily upon *United States ex rel. Boscola v. Bledsoe*, 152 Fed. Supp. 343, affirmed by this Court, 245 F. 2d 955, that we are obliged to discuss that case and show its inapplicability to the present situation. In that case, the petitioners were retired regular enlisted members of the Navy retired under the predecessor of 10 U. S. C., Section 6326. They were ordered involuntarily to “full time active duty” with place of duty being the United States Naval Receiving Station, Seattle, Washington, and in addition were restricted in their place of duty to only a portion of that station. The decision of the District Court is only an authoritative statement of the proposition, which has never been doubted, that retired persons cannot be called into or placed upon “full time active duty,” at a particular base, within the meaning of 10 U. S. C., Section 101(22), except under the criteria specified in the statute, namely, in “time of war,” “national emergency,” etc. Since the criteria were obviously not met, the active duty was illegal and the District Court in granting a Writ of Habeas Corpus did no more

than many other District Courts have done in granting Writs of Habeas Corpus in Selective Service induction cases where the person has been illegally inducted.

It is obvious, therefore, that the *Bledsoe* case has nothing to do with court-martial jurisdiction over retired persons and is not in point in our present case. The exercise or existence of jurisdiction over a retired person in his retired status has nothing to do with whether or not the person is on "active duty." The reason is very simple: If jurisdiction over a retired person for such an offense did not exist by reason of 10 U. S. C., Section 802(4) at the time of the offense, it could not possibly be created by any later acts of the parties under Section 802(1). Thus, it makes no difference in such a case even if the accused retired person voluntarily accepts active duty after he is charged with the offense and pending the court-martial proceedings. It is an elementary principle not requiring citation of authority in both military and civil courts that if jurisdiction does not exist over an offense at the time it is committed, it cannot be created by consent of the parties.

It has been customary in the military, in cases involving "members of the armed forces" who are not, however, assigned to "full time active duty" at a particular base, to call such a person to active duty at the base or place where the proceedings are to take place.

The reason for this, however, has nothing to do with the existence or exercise of jurisdiction over the offense. The reason is that it is an administrative convenience for all concerned under the circumstances to have the accused on full time active duty on an occasion when in all probability his attendance at the base on a full time basis is likely to be necessary. The benefit to the accused in ex-

change for the inconvenience of being tried is that on active duty he receives full pay and emoluments rather than the percentage of the pay that he receives in his retired status. There is some suggestion in the opinion in the *Bledsoe* case that court-martial proceedings were related to the active duty. However, we have no idea what the parties had in mind by their stipulation which apparently excluded from the consideration of the court the exercise or existence of jurisdiction over the petitioners under Section 802(4). Suffice it to say that as we pointed out above, the existence of court-martial jurisdiction logically could not have been involved in that case. For a recent example of voluntary call to active duty concurrent with exercise of jurisdiction over a "member of the armed forces," not otherwise on "full time active duty," see *Wheeler v. Reynolds*, 164 Fed. Supp. 951.

Respectfully submitted,

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APPENDIX.

[9 USCMA 637, 26 CMR 417]

United States Court of Military Appeals.

United States, Appellee, v. Selden G. Hooper, Rear Admiral (Retired), U. S. Navy, Appellant. No. 11,113.

On Mandatory Review

Decided September 26, 1956

Commander Charles Timblin argued the cause for Appellant, Accused.

Commander Louis L. Milano argued the cause for Appellee, United States. With him on the brief was *Commander Craig McKee*.

OPINION OF THE COURT

ROBERT E. QUINN, Chief Judge:

The accused was convicted by general court-martial¹ of violations of Articles 125, 133 and 134, Uniform Code of Military Justice, 10 USC §§ 925, 933, 934, and was sentenced to dismissal and total forfeitures. The case is before this Court for mandatory review in accordance with Article 67(b) (1), Uniform Code, *supra*, 10 USC § 867.

At the outset of this review we are met, as were the tribunals below, with a defense claim that the court-martial had no jurisdiction over the accused. The factual basis for this position is undisputed.

¹WC NCM 57-00988

On December 1, 1948, upon Presidential approval, the accused was transferred to the Regular Navy retired list with the rank of Rear Admiral but with retired pay based on the rank of Captain, in accordance with the provisions of Title 34 USC §§ 410b and 410n.² While in this status, the offenses occurred, and the charges were preferred against him. He was informed of said charges April 15, 1957, by the Acting Commandant, 11th Naval District. After full investigation was held, as required by Article 32, Uniform Code, *supra*, 10 USC § 832, the Commandant, 11th Naval District, referred the charges for trial to a general court-martial convened at his direction. Thereafter, a copy of the charges was served upon the accused. No pretrial restraint was imposed. On May 6, 1957, the date set for trial, the accused, together with civilian counsel of his own selection, and appointed military counsel, appeared before the court-martial. Upon arraign-

²§ 410b. "When any officer of the Regular Navy or the Regular Marine Corps or the Reserve Components thereof, including any member of the naval service temporarily appointed to commissioned grade whose permanent status is enlisted, has completed more than twenty years of active service in the Navy, Marine Corps, Army, Air Force, or Coast Guard, or the Reserve Components thereof, including active duty for training, at least ten years of which shall have been active commissioned service, he may at any time thereafter, upon his own application, in the discretion of the President, be placed upon the retired list on the first day of such month as the President may designate. As used in this section 'active commissioned service' includes all active service performed under a temporary appointment to a commissioned grade, including a commissioned warrant grade, by an officer whose permanent status is enlisted."

§ 410n. "All officers of the Navy, Marine Corps, and the Reserve components thereof, who have been specially commended for their performance of duty in actual combat by the head of the executive department under whose jurisdiction such duty was performed, when retired, except officers on a promotion list who may be retired for physical disability, shall, upon retirement, be placed upon the retired list with the rank of the next higher grade than that in which serving at the time of retirement and the grade in which serving at the time of retirement shall be construed to mean

ment, counsel interposed his challenge to the jurisdiction of the forum, but his contentions were denied. Rather than enter his pleas, the accused, as was his right, stood mute, so a plea of not guilty was entered as to each charge and specification.

The trial court relied upon Article 2 of the Uniform Code, supra, 10 USC § 802, as its source of jurisdiction. This provides, in pertinent part:

“The following persons are subject to this chapter :

.
(4) Retired members of a regular component of the armed forces who are entitled to pay; . . .”

Neither by its express terms nor by any related provision of the Code, or other Congressional enactment, are any limitations or conditions put upon the exercise of the jurisdiction thus conferred. Hence, if this section is not contrary to the Constitution, it authorizes the proceedings in this case.

the highest grade in which so serving whether by virtue of permanent or temporary appointment therein: *Provided*, That all officers heretofore and hereafter holding rank or grade on the retired list above that of captain in the Navy or colonel in the Marine Corps solely by virtue of such commendation, if hereafter recalled to active duty, may, in the discretion of the Secretary of the Navy, be so recalled either in the rank or grade to which they would otherwise be entitled had they not been accorded higher rank or grade by virtue of such commendation, or in the rank or grade held by them on the retired list: *Provided further*, That the provisions of this subsection shall not apply in the case of any officer who has been so commended if the act or service justifying the commendation was performed after December 31, 1946: *Provided further*, That nothing in this subsection shall be construed to increase the retired pay of officers heretofore or hereafter placed upon the honorary retired list for the Naval Reserve: *Provided further*, That officers of the classes described in this subsection who have been retired prior to August 7, 1947, shall be entitled to the benefits of this subsection from August 7, 1947: *And provided further*, That nothing in this subsection shall be held to reduce the retired rank or pay to which an officer would be entitled under other provision of law.”

The defense argues, however, that jurisdiction over retired naval officers, such as the accused, cannot attach in the absence of an order effecting their return to active duty; that if the order directing trial is considered an order to active duty, it conflicts with 10 USC § 6481,³ for it was not issued by the Secretary of the Navy, in time of war or national emergency declared by the President, nor with the consent of the officer concerned.

We cannot, consistently with well-established rules of statutory construction, accept this view. Engrafting such a requirement upon Article 2(4) would nullify its provisions completely. Article 2(1) makes all persons on active duty subject to the Code in the following language:

“The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey it.”

An officer recalled to duty from the retired list of a regular component is subject to the Code by virtue of this provision alone. It necessarily follows from this that if Article 2(4) requires the individual be recalled as a condition

³10 USC § 6481. “In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent.”

precedent to its effectiveness, its provisions are entirely unnecessary and could never be operative.

In this particular, 50 Am Jur, Statutes, § 359, notes:

“It should not be presumed that any provision of a statute is redundant. To the contrary, it is to be presumed that one paragraph or word of a statute is not a needless repetition of another, and courts should hesitate in ascribing careless and needless tautology to the lawmaking body. Hence a construction will be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase the same meaning as the word or phrase preceding it, so that the latter adds nothing to the statute.”

See also *United States v. Bledsoe*, 152 F Supp 343 (WD Wash) (1956).

The *Bledsoe* case, *supra*, relied on by the defense as an additional authority for its position that jurisdiction did not lawfully attach, is inapposite. There, retired enlisted men were recalled to active duty solely for the purpose of appearing before a court-martial for trial upon charges arising out of their activities while in a retired status. The suit was instituted to release the accused from their physical restraint and did not pass on the question of the jurisdiction of the naval service to try them under the Article here involved. The court held that a call to active duty for that single purpose was contrary to the statute relied upon.⁴ Upon appeal, this conclusion was affirmed by

⁴“The Secretary of the Navy is authorized in time of war, or when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the pay and allowances authorized by section 26 of Title 37, except as otherwise provided in the next section.” 34 USC § 433 (March 3, 1915, c. 83, 38 Stat 941; August 29, 1916, c. 417, 39 Stat 591).

the United States Court of Appeals for the Ninth Circuit. 245 F 2d 955 (1957). Although the result reached by the Circuit Court of Appeals, Second Circuit, in *United States v Fenno*, 167 F 2d 593 (1948), in a substantially similar case, is apparently contrary to that expressed in the *Bledsoe* opinion, we are not called upon to decide the question, for in this case, the accused was neither restrained nor recalled to duty. He appeared in person before a general court-martial, the processes of which were begun by charges duly preferred and served upon him. If the accused is personally subject to court-martial jurisdiction under the Constitution and the Uniform Code, these successive steps were sufficient for jurisdiction to attach and authorize the court-martial to proceed to trial. *Barrett v Hopkins*, 7 Fed 312 (CC D Kan) (1881); *In re Walker*, 3 Am Jurist 281; *In re Carver*, 103 Fed 624 (CC D Maine) (1900); *United States v Reaves*, 126 Fed 127 (CA 5th Cir) (1903).

In *Closson v Armes*, 7 App DC 460, Captain Armes, an officer on the retired list, sent an offensive letter to Lieutenant General Schofield, then commanding the Army of the United States and acting as Secretary of War. General Schofield ordered Armes' arrest and confinement upon charges arising therefrom. This order was carried out. The Court of Appeals for the District of Columbia upheld the arrest in an opinion in which, after alluding to the statutory basis for jurisdiction over the officer, it declared:

"The appellee, therefore, being an officer of the army, although on the retired list, and subject as such to trial by court-martial for violation of the articles of war, and the charges against him being for offences against those articles, such as have been stated, his arrest to answer those charges was right and proper.

Actual arrest, or some equivalent of it, is an essential prerequisite under our system of criminal jurisprudence to the exercise of jurisdiction by any court having cognizance of criminal causes. It is an elementary principle in our law that no man is to be tried for crime in his absence. The arraignment of an accused person in court to hear the charge against him and to respond to it is essential to give validity to any proceeding thereon against him; and the only mode known to our law to secure the presence of such accused person for the purpose is by arrest. It is very true that an accused person may come in and voluntarily surrender himself; and that thereupon a court may proceed without the usual preliminary arrest. *But upon his surrender, he is in fact, and in contemplation of law, under arrest, and subject to detention.*" [Emphasis supplied.]

The final phase of the defense argument raises the applicability of the 5th Amendment to the Constitution. He contends that if Article 2(4) of the Code, supra, is considered without reference to other provisions, "it would seem to permit a military commander to snatch a retired regular off the streets and thrust him before a court-martial." Of course, this accused was not "snatched off the streets" nor was he "thrust before a court-martial." After due notice of the charges, he voluntarily appeared before the court-martial. Thus, there is found in this case none of the brutal and shocking circumstances suggested by the defense. If such circumstances ever operate to deprive a tribunal of its otherwise lawful authority, the accused here is in no position to avail himself of such a rule.

The Fifth Amendment of the Constitution provides:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *except in cases arising in the land or naval forces*, or in the militia, when in actual service in time of war or public danger; . . .”
[Emphasis supplied.]

The sole problem left for resolution is whether or not the accused, as a retired member of a regular component of the Armed Forces entitled to receive pay, is a part of the “land or naval forces.”

Courts which have heretofore expressed opinions on this question have concluded that retired personnel are a part of the land or naval forces. In arriving at this conclusion, each, with the exception of *United States v Fenno*, supra, appear to have assumed that being a part of such forces, court-martial jurisdiction necessarily attaches to them.

The Court of Claims has held retired personnel a part of the military force of this country. *Tyler v United States*, 16 Ct Cl 223; *Runkle v United States*, 19 Ct Cl 396; *Franklin v United States*, 29 Ct. Cl 6. When the *Tyler* case, supra, was before the United States Supreme Court, that tribunal, speaking through Mr. Justice Miller, declared:

“It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, *who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules,*

and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.” [United States v Tyler, 105 US 244, 26 L ed 985. Emphasis supplied.]

In *Closson v Armes*, *supra*, the Court of Appeals of the District of Columbia, stated:

“This case is not that of a civilian ruthlessly imprisoned by arbitrary military authority. The appellee is an officer of the army of the United States, entitled to wear its uniform and to draw pay as such, and by express provision of the statute law of the United States for the government of the army, made subject to the rules and articles of war, and to trial by court-martial for any infraction of those articles. Rev Stats US, sec 1256. Nor is the force of the statute broken by the fact that the duties of a retired officer, such as the appellee is, are of an exceedingly limited character, being restricted substantially to drawing his pay, reporting his place of residence to the War Department monthly, and being assignable to duty at the Soldiers’ Home, and, at his own request, to duty as professor in any college; and that, subject to these restrictions, a retired officer of the army may enter into any private business into which he chooses to embark, not inconsistent with his duties to the United States. In the nature of things, some of the articles of war cannot apply to retired officers, for the reason that either in express terms or by necessary implication, they concern the duties of those in active service. But so far as the articles of war can be applicable to the retired officer of the army, the statute unquestionably makes these latter subject to them and to all the processes of the military law for all offences committed by them in violation of those articles.”

In *United States v Fenno*, 167 F 2d 593, the Circuit Court of Appeals for the Second Circuit, discussing an earlier statute making members of the Fleet Reserve subject at all times to the laws, regulations, and orders for the government of the Navy⁵ stated:

“Nor do we find this statute to be unconstitutional. The Fleet Reserve is so constituted that it falls reasonably and readily within the phrase ‘naval forces’ in the Fifth Amendment. Its membership is composed of trained personnel who are paid on the basis of their length of service and remain subject to call to active duty. While keeping Fleet Reservists on such pay, Congress has, to be sure, also allowed them to accept employment in civilian capacities. But this need not, and does not, materially diminish their obligations as members of the Fleet Reserve. During the time they are on inactive duty, they remain immune from discharge, with its accompanying loss of pay, except as the statute provides. The government at the same time obtains the benefit of having a trained body of men subject to recall to active duty when needed. To exclude Fleet Reservists while in this status from a classification within the ‘naval forces’ would be, we think, to construe the broad terms of the Fifth Amendment much too narrowly.”

Not without significance is the language of President Wilson in his veto of a measure which would have terminated amenability of retired personnel to trial by court-martial. This is what he said:

“The original act establishing the retired list of the Army (act of Aug. 3, 1861) referred to the personnel therein included as only partially retired, and provided

⁵34 USC (1946 ed) § 853(d).

that a retired officer should be entitled to wear the uniform of his grade, should be borne on the Army Register, and should be subject to the rules and Articles of War, and to trial by general court-martial for any breach of these articles. By the act of July 24, 1876, officers of the Army on the retired list were specifically declared to constitute a part of the Regular Army, a provision which is found repeated in subsequent acts affecting the organization of the Army; and other statutes enacted during this period made retired officers of the Army available for certain classes of active duty, in time of peace with their consent, and in time of war without their consent. By the recently enacted national defense act, the authority of the President over retired officers has been further extended so as to make them subject to his call in time of war for any kind of duty without any restriction whatever. Courts and Attorneys General have in a long line of decisions held that officers of the Army on the retired list hold public office. It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in the active Army. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subjected to active duty in time of national emergency by

the mere order of the Commander in Chief. They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President.

“The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a common discipline. I am persuaded that officers upon the retired list would themselves regard as an invidious and unpalatable discrimination which in effect excluded them from full membership in the profession to which they have devoted their lives, and of which by the laws of their country they are still members. So long as Congress sees fit to make the retired personnel a part of the Army of the United States, the constitutionality of the proposed exemption of such personnel from all liability under the Articles of War is a matter of serious doubt, leaving the President, as it does, without

any means sanctioned by statute of exercising over the personnel thus exempted the power of command vested in him by the Constitution.

“Convinced, as I am, of the unwisdom of this provision and of its baneful effect upon the discipline of the Army; doubting, as I do, the power of Congress wholly to exempt retired officers from the control of the President, while declaring them to be a part of the Regular Army of the United States, I am constrained to return this bill without my approval.” [53 Congressional Record 12844.]

Colonel Winthrop, while expressing strong doubts about jurisdiction over civilians generally, had this to say about jurisdiction over retired personnel:

“That retired officers are a part of the army and so triable by court-martial—a *fact indeed never admitting of question*—is adjudged in *Tyler v U. S.*, 16 Ct Cl, 223; *Id.*, 105 US 244 . . .” [Winthrop’s *Military Law and Precedents*, 2d ed, 1920 Reprint, page 87, footnote 27. Emphasis supplied. See also 29 Op Atty Gen 503.]

Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the military way of life,

and who receives a salary to assure his availability, is a part of the land or naval forces.

Left for determination is the applicability of the Articles herein involved to one in a retired status. Certainly conduct unbecoming an officer and gentleman—the subject of Charge II—and conduct of a nature to bring discredit upon the armed forces—the subject of Charge III—are offenses which do not depend upon the individual's duty status. Sodomy, the subject of Charge I, in an offense involving moral turpitude, and without doubt necessarily applies to all subject to military law without regard to the individual's duty status.

For the foregoing reason, we hold that the court-martial had jurisdiction over this accused.

The remaining assignments of error present little difficulty and may be disposed of readily. The accused contends that agents of the Office of Naval Investigation procured certain evidence against him in violation of the Fourth Amendment to the Constitution. This evidence consists of the agents' accounts of their observation of the accused's activities while they held his home under surveillance from a neighboring dwelling. Permission to use the latter dwelling for such purpose was obtained from the owners, and at no time did the agents' physically go upon the premises occupied by the accused. Such surveillance does not amount to a search, and an unwarranted invasion of privacy is not involved. *McDonald v United States*, 335 US 451, 93 L ed 153, 69 S Ct 191; *Fisher v United States*, 205 F 2d 702 (CA DC Cir); *Love v United States*, 170 F 2d 32 (CA 4th Cir); *Paper v United States*, 53 F 2d 184 (CA 4th Cir). Furthermore, no objection was made to this evidence at trial. This failure

precludes consideration of the question at this level. United States v Dupree, 1 USMCA 665 5 CMR 93.

In a further assignment, the defense argues that the evidence is legally insufficient to support the findings upon the specification of Charge III. This argument is predicated entirely upon the validity of the foregoing assignment, which we have held lacking in merit. Thus, it need not be further discussed.

Alleged improprieties in the trial counsel's opening statement are the basis of the next defense assignment. We have examined with care both the opening statement and all of the evidence presented at the trial. While the record does not bear out each and every item which the prosecutor said he expected to prove, in exactly the manner described, the general import of the evidence is consistent with the opening remarks. In any event, whatever variance existed between them is entirely too slight to have any noticeable effect upon the triers of fact. The most important of the variance alleged is that relating to the witness McDaniels. This individual testified that after he was first interrogated by naval investigators, he advised the accused. A meeting between the pair was then arranged in a San Diego restaurant where the details of the interrogation were discussed. According to McDaniels, the accused advised him that if "he [the accused] was convicted of anything, that we would all be drug down by it." He then informed McDaniels he could disavow his earlier statement and deny that the acts he had described had ever occurred inasmuch as the first statement was not under oath. McDaniels then acknowledged that at the pretrial investigation he denied the accused's complicity in any of the offenses, and in so doing committed perjury.

In their testimony the other witnesses made similar acknowledgements of perjury before the pretrial investigator.

In view of this testimony, trial counsel's opening statement, that the accused had so instructed McDaniel and "all three did as requested and perjured themselves at the pretrial," was merely fair comment upon the testimony he expected to produce. Cf. *United States v Doctor*, 7 USCMA 126, 21 CMR 252.

The defense next contends that the law officer improperly curtailed cross-examination of prosecution witnesses Schmidt and McDaniels. On direct examination, Schmidt testified to the three separate acts of sodomy alleged in three specifications of Charge I. Under cross-examination, he acknowledged he had been granted immunity from prosecution for perjury committed at the pretrial investigation. After admitting his pretrial exculpation of the accused to be a lie, further cross-examination developed the admission that such testimony amounted to perjury. The defense counsel then sought to retrace each of the statements made, but the law officer sustained a prosecution objection, declaring that the matters had been covered adequately.

Undoubtedly cross-examination of prosecution witnesses stands at the forefront of the rights afforded accused individuals under our scheme of justice. This right is best protected by affording the cross-examiner reasonable latitude in the scope and extent of his interrogation. However, some limits are required, and courts generally have left these limits to the determination of the trial judge in the exercise of his sound discretion. *Alford v United States*, 282 US 687, 75 L ed 624, 51 S Ct. 218; *United States v Heims*, 3 USCMA 418, 12 CMR 174.

In the instant case, the law officer's ruling with respect to the cross-examination of Schmidt was a proper exercise of his discretion. The witness had admitted that his pretrial statement exculpating the accused was perjury. To permit counsel to recite each and every portion of that statement would serve no useful purpose, for the optimum of impeachment had already been obtained. In this particular, we note that the accused was acquitted of two of the specifications concerning which this witness testified. Schmidt's testimony with reference to them was uncorroborated. His testimony relative to the single specification of which the accused was convicted under Charge I was corroborated, in part, by testimony of the Intelligence agents. Under the circumstances, we conclude the accused was not prejudiced by the curtailment.

The same considerations apply to the testimony of the witness McDaniels, and nothing presented by the record or the arguments of counsel require further elaboration upon that portion of the assignment respecting it.

The next assignment requiring discussion challenges the sufficiency of the specification of Charge II to state an offense under Article 133 of the Uniform Code, *supra*. That specification alleges that the accused "publicly associate[d] with persons known to be sexual deviates, to the disgrace of the armed forces."

Historically, conduct violative of this Article is defined as "action or behavior in an official capacity which, in dishonoring or disgracing the individual . . . personally, seriously compromises his standing as an officer." Manual for Courts-Martial, United States, 1951, paragraph 212; Winthrop's Military Law and Precedents, 2d ed, 1920 reprint, pages 711, 712. Instances of such conduct cited by each of the foregoing authorities include "public asso-

ciation with notorious prostitutes.” The defense seeks to equate this example to the offense sought to be alleged in the specification in question. The gist of that offense, according to the defense argument, is the unfavorable reaction upon the minds of those who might observe the association. *United States v Sparhawk*, 24 BR 127; *United States v Stroud*, 48 BR 231, Hence, the failure of this specification to allege the notorious character of the individuals associated with is fatal.

While the provisions of the security regulations might cast strong doubt upon the necessity for showing that notoriety attends every such association⁶—a circumstance which we need not here determine—the present specification sufficiently alleges that element. It avers that the individuals were “known to be sexual deviates” and that the accused’s association with them was “to the disgrace of the armed forces.” Manifestly, this combination of allegations imports the element of “notorious,” for, if the association is completely unknown, or, if the characters of the individuals are unknown, the armed forces would not be disgraced. See *United States v Sparhawk*, *supra*. The capacity of such association to dishonor or disgrace the accused as an individual, and seriously compromise his standing as an officer, is patent. Thus, the specification is not deficient.

The law officer’s instructions upon this offense were consistent with these views. There is, therefore, no necessity for discussing a defense contention that they were defective.

⁶*United States Navy Regulations*, Article 1510; *United States Navy Security Manual for Classified Matter*; *Army Regulations* 604-5 and 604-10; *Air Force Regulation* 205-6.

This brings us to one further assignment of error relating to the specification of Charge II. The accused contends that by permitting Government witnesses to testify that certain individuals were homosexuals, the law officer erred to his prejudice. This refers to testimony of Schmidt, McDaniels, and agent Strolin. As a law enforcement officer, the latter certainly was in a position, as indicated by this testimony, to know the reputation of the individuals with whom the accused associated. Both Schmidt and McDaniels were admitted deviates of long-standing. Each asserted thorough knowledge of the activities of all those with whom the accused associated on the occasion in question. The sum total of these activities was expressed by these witnesses in the conclusion now objected to. Without detailing the specifics of the depravity involved, it is sufficient to here record that their testimony was not an expression of opinion upon the meaning of certain traits or tendencies nor upon a hypothetical situation. They described acts which leave no doubt about the accuracy of their characterizations. Thus, there was no error in receiving this testimony.

A final assignment relative to Charge II challenges the sufficiency of the evidence to support the findings thereon. This is predicated upon the assumption that since the association occurred solely in the presence of sexual deviates, the element of disgrace to the services is necessarily lacking. This argument misconceives the evidence, for the conduct was observed by intelligence agents, and at least one female was present. Assuming the correctness of the defense estimate of the evidence, the fallacy of this argument is completely demonstrated by this Court's opinion in *United States v Berry*, 6 USCMA 609, 20 CMR 325.

Other assignments relate to alleged improper remarks by trial counsel during the course of trial, the characterization of the accused as "a very immoral man" by one of the witnesses, improper use of the Manual for Courts-Martial, *supra*, by court members, and destruction of certain photographs. None of these assignments are meritorious.

The accused next asserts that the post-trial review of the staff legal officer is fatally deficient in two particulars. First, he omitted all mention of the evidence produced by the defense, and, second, he expressed no opinion as to the adequacy and weight of the evidence as a whole. The Government concedes that the review is defective and that a new review is required. Our examination of the review indicates that this concession is proper. *United States v Fields*, 9 USCMA 70, 25 CMR 332; *United States v Grice*, 8 USCMA 166, 23 CMR 390; *United States v Johnson*, 8 USCMA 173, 23 CMR 397.

Our disposition of the latter assignment makes unnecessary further consideration of a claim that the convening authority's issuance of letters of immunity to prosecution witnesses disqualified him from reviewing the record of trial.

The decision of the board of review is reversed. The record of trial is returned to The Judge Advocate General of the Navy for reference to another reviewing authority for further proceedings under Articles 61 and 64, Uniform Code of Military Justice, 10 USC §§ 861, 864.

Judges LATIMER and FERGUSON concur.

United States Court of Appeals
FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral
USN, Commandant, Eleventh
Naval District,

Appellee.

REPLY BRIEF

Appeal from the United States District Court for
the Southern District of California
Southern Division

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

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USN, Commandant, Eleventh
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Appellee.

REPLY BRIEF

ARGUMENT

I

The Secretary of the Navy Is Not Indispensable
To This Action.

The only argument raised in Appellee's Brief not fully covered in Appellant's Opening Brief is that of

jurisdiction. Appellee's major argument is that the Secretary of Navy is indispensable to this action. Appellant does not admit this claim but, assuming this is true arguendo, such a person need only be sued if the relief sought is a writ of prohibition, mandamus or an injunction under the Appellee's argument. The Government admits that there is a sufficient amount of controversy, together with a "Federal question." (Appellee's Brief, p. 7). However, the Government argues that a decree requiring action cannot be granted and, thus, no jurisdiction exists. This contention rests on the premise that no remedy can be given in this action. Therefore the question is one of availability of remedies and not of jurisdiction over the subject matter.

The lack of a coercive remedy is not decisive on the question of jurisdiction. Under the Taft-Hartley Act the Federal Courts have jurisdiction of a suit for breach of a collective bargaining agreement. However, the Norris-LaGuardia Act prohibits injunctions in such a suit, Textile Workers v. Lincoln Mills, 353 U.S. 448.

In this suit the Court below held that jurisdiction existed to grant a declaratory judgment. This was proper, since a declaratory judgment is a specific and separate remedy. A similar case is United Public Works v. Mitchell, 330 U.S. 75. There an injunction against enforcement of the Hatch Act was sought, together with a declaratory judgment. The Act was unconstitutional. In upholding the legality of the Act the Court held that it was not necessary to determine whether a court of equity would enforce by

injunction any judgment declaring rights, stating:

"...we see no reason why a declaratory judgment action, even though constitutional issues are involved, does not lie." at p. 93.

Further it was stated:

"A judgment, which, without more, adjudicates the status of a person is permissible under the Declaratory Judgment Act." At p. 119.

Declaratory relief is a proper remedy to determine the constitutionality of a Federal Act, Railway Conductors v. Swan, 329 U. S. 520; Currin v. Wallace, 306 U. S. 1.

The Commandant of the Eleventh Naval District is a sufficient defendant. He is the one that ordered the Court Martial, not the Secretary of the Navy. Appellant contends he did so without right. A suit is permitted against a public official who invades a private right, either by exceeding his authority or by carrying out a mandate of his superior, U. S. v. Lee, 106 U. S. 196.

The Appellee argues that no declaratory judgment could prevent the Secretary of the Navy from ordering another court martial of appellant. If jurisdiction existed in the initial Court Martial, then a subsequent trial by one would constitute double jeopardy. If jurisdiction did not exist in the original hearing it could never exist at a later date.

II

The Appellant Was Not Subject to Court Martial Jurisdiction.

The Appellee admits that Appellant was not "on duty" nor subject to the command of Appellee. The Government categorizes Appellant's position as one of being "a member at large", (Appellee's Brief p. 21). Thus it is tacitly admitted that Appellant had no existing relation to the military at the time of the alleged offense or the Court Martial.

This Court has held that the jurisdiction of a Court Martial under the Constitution is based on: "present relation to the Military", Lee v. Madigan, 248 F. 2d 783, 786, Cer't. granted, 356 U.S. 911 (9th Cir. (1957)) (emphasis added).

The argument that Appellant receives pay, and not a pension, to hold himself in readiness is not tenable. Retirement pay is based on years of prior service as well as rank, 10 U. S. C., Secs. 1332, 1333, 1334. Further, a retired officer may convert his retirement pay into annuity by election, 10 U. S. C. Sec. 1434. An annuity can hardly be said to constitute pay. Especially when payable to a widow.

Appellee has submitted the opinion of the Court of Military Appeals as part of its Brief. Being a Court of limited jurisdiction, this opinion is without force before this honorable body. The decision therein on further review has no effect on the question of exhausting remedies.

Even if exhaustion of military remedies is required before seeking a declaratory judgment, (such a holding would violate the language of the declaratory judgment statute) this Court should hold the case pending a final decision in the military appellate system, Gusik v. Schilder, 340 U. S. 128.

It is respectfully submitted that the decision should be reversed with directions to enter a judgment declaring Article 2(4) of the Uniform Code of Military Justice unconstitutional.

HILLYER & CRAKE

By OSCAR F. IRWIN

No. 16063 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY, a Corporation,
Appellee.

On Appeals From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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I.

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Appellee.

On Appeals From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The findings of fact, conclusions of law and judgment of the District Court [R. 62-73] are not yet officially reported.

Jurisdiction.

These appeals involve federal income taxes for the year 1951. The taxes in dispute were paid as follows: \$126,000 on March 17, 1952; \$126,000 on June 13, 1952;

\$75,262.55 on September 16, 1952; \$57,531.59 on December 15, 1952; and, \$4,282.70 on February 15, 1954. [R. 69.] Claim for refund was filed on March 9, 1955, and was neither allowed nor disallowed during the following six months. [R. 68.] On July 27, 1956, within the time provided in Section 6532 of the Internal Revenue Code of 1954, the taxpayer brought an action in the District Court for the recovery of a portion of the taxes paid. [R. 68.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on April 14, 1958. [R. 72-73.] Within sixty days, on May 16, 1958, notice of appeal was filed by the taxpayer. [R. 73-74.] Also within sixty days, on June 10, 1958, notice of appeal was filed by the United States. [R. 75.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Questions Presented.

The taxpayer mined a calcium carbonate rock which it blended with other materials (some mined and some purchased) in an integrated mining-manufacturing process resulting in the production of Portland cement. The District Court found that under the provisions of Section 114(b)(4)(A) of the Internal Revenue Code of 1939 the taxpayer was entitled to compute its percentage depletion deduction at the 10 per cent rate provided for "calcium carbonates." It was further held that the taxpayer's commercially marketable mineral product was bulk Portland cement and that the income attributable to the mined and purchased ingredients should not be excluded from the depletion base, but that the cost of bags and bagging should be excluded. Both parties have appealed.

1. The question presented by the taxpayer's appeal is whether the District Court erred in classifying its mineral

as calcium carbonate (10 per cent) rather than chemical grade limestone (15 per cent).

2. The question presented by the Government's cross-appeal is whether the income attributable to the mined and purchased ingredients was erroneously included in the depletion base.

Statutes and Regulations Involved.

The pertinent provisions of the Internal Revenue Code of 1939 and Treasury Regulations 111 are set forth in the Appendix, *infra*.

Statement.

The relevant facts as stipulated by the parties [R. 16-17; 27-40; 40-42], found by the District Court [R. 62-72], and appearing in evidence of record are summarized below.

The taxpayer, Monolith Portland Cement Company, is a Nevada corporation conducting business in the State of California. During the year 1951 it had a limestone quarry and cement plant at Monolith, California, and mined limestone which it used in making cement. It also mined other raw materials which it used in making cement—clay #1, clay #2, tufa, and gypsum—at places some distance away. In addition, it purchased, for use in its operations, stipulated quantities of iron cinders and fluorspar. Applying customary processes used in the cement industry, these raw materials were blended and processed into Portland cement at the cement plant at Monolith, California. [R. 18-19, 63.]

The processes employed by the taxpayer in arriving at the finished product of Portland cement can be summarized as follows: The calcium carbonate rock was blasted from

the face of the quarry by the open pit method, and further broken into manageable size by secondary or squib blasting. The rock was then taken by rail to a large primary crusher which reduced the size of the rock to pieces with a maximum diameter of about six inches. After secondary crushing the rock was transported to the cement plant and placed either in the limestone hopper or in a raw pile used to replenish the hopper. The limestone was then blended with clay #1 from another hopper, with clay #2¹ from another hopper, and with iron cinders from another hopper by measuring and conveying equipment. The blended materials were then gravity fed into a ball mill where water equal to approximately 36 per cent of the weight of the dry raw materials was added and it was ground to a proper fineness known as a "slurry." The slurry after further grinding in tube mills was conveyed to a wet slurry tank where it was kept in suspension and blended by a revolving paddle mechanism and, after blending, fed into a kiln. The kiln fed slurry was run into the upper end of rotary kilns, which were in the form of long rotating cylinders set at a slight inclination. The feed traveled gradually toward the lower end. Hot gases from a flame at the lower end evaporated the water from the slurry, and the application of heat at a proper temperature chemically combined the remaining material to a dense "clinker." The clinker was conveyed to a grinding mill where gypsum was added, and these were ground to a great fineness to become one of the various types of Portland cement. It does not appear in the stipulation the precise point at which the tufa and fluorspar were added. [R. 18, 21-24.]

¹Clay #2 was called silica in production records [R. 19] and on the income tax return [Ex. No. 2, R. 43].

At the completion of the processes referred to above, the cement was stored in silos. From there it was either loaded and shipped in bulk or bagged and loaded and shipped in bags. During the year 1951, 63.49 per cent of the taxpayers's cement sales were of bulk cement. The remaining sales were of cement placed in bag or sack containers. The only product sold by the taxpayer during the year 1951 as a result of its limestone mining operations was Portland cement. [R. 64-65.]

The taxpayer timely filed a corporation income tax return for the year 1951 on which it claimed depletion deductions for calcium carbonate, clay and tufa. The depletion base for the 10 per cent allowance for calcium carbonate was computed in the return by treating the slurry as the first marketable mineral product and reducing the gross income from mining by income attributable to subsequent steps. A claim of refund on the theory that the finished product, Portland cement, was the commercially marketable mineral product was filed on March 9, 1955, and after six months the present action was brought by the taxpayer claiming a refund in the amount of \$166,811.04. By amended and supplemental complaints, the taxpayer alleged that the cost of bags and bagging the cement should be excluded from the computation (which, in relation to the net income limitation, increased the depletion of deduction) and prayed for judgment in the increased amount \$264,435.41, plus interest. [R. 64-65, 3-13, 43-45, 47-49.]

The District Court found that limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone. The actual computed high and low chemical analysis made approximately each week of the material mined by the taxpayer revealed a high of 87.68 per cent calcium car-

bonate and a low of 82.45 per cent, or an average of 85.20 per cent of calcium carbonate. The District Court held that this calcium carbonate content was not high enough to qualify the material as "chemical grade limestone" within the meaning of Section 114(b)(4)(A) of the Internal Revenue Code of 1939. [R. 64.]

It was further found that the taxpayer's commercially marketable mineral product from the mining of calcium carbonate was bulk Portland cement. In computing the gross income from the sale of Portland cement, total sales were reduced by the additional charge made by the taxpayer on its sales of Portland cement in bags, and by royalties, trade discounts, contract and own fleet trucking, rail freight, warehouse and bulk storage plant costs at distribution points away from taxpayer's cement plant. In computing net income from mining, the cost of bags and bagging and the other items enumerated above were excluded. The computation thus made resulted in gross income from mining of \$6,663,622.38 and net income from mining of \$1,257,641.79, with an allowable depletion deduction of \$628,820.89.² Accordingly, judgment in the amount prayed for in the complaint, \$264,435.41 plus interest, was entered. [R. 65-67, 72-73.]

The District Court refused to exclude from the gross and net income from mining calcium carbonate the income attributable to the raw materials clay #1, clay #2 (silica), gypsum, fluorspar, iron cinders and tufa. Under the computation included in the Government's proposed amendments to the proposed findings of fact and conclusions of

²The depletion allowable under Section 114 of Internal Revenue Code of 1939 is 10 per cent of the gross income from mining (\$666,362.24) but not to exceed 50 per cent of the net income from mining (\$628,820.89). Accordingly, the latter figure was used in the District Court's computation.

law, the exclusion of these items would have reduced the allowable depletion to \$521,462.18, and the refund to \$209,950.86. [R. 54-61.]

Statement of Points to be Urged.

In computing the taxpayer's percentage depletion base under Section 114(b)(4) of the Internal Revenue Code of 1939, consisting of the taxpayer's gross income from the mining of calcium carbonate, the District Court erred in failing to exclude income attributable to the additives clay #1, clay #2, fluorspar, gypsum, tufa and iron cinders.³

Summary of Argument.

I.

The Government's appeal involves the question whether the addition of raw materials in the manufacture of Portland cement is an ordinary treatment process applied to the taxpayer's limestone, which was held by the District Court to come within the statutory classification of "calcium carbonates." Under Section 114(b)(4) of the Internal Revenue Code of 1939 a depletion deduction for calcium carbonate is allowed in the amount of ten per cent of the taxpayer's gross income from mining calcium car-

³In the statement of points on which it intended to rely on cross-appeal [R. 148-149], the United States incorporated the designation of points on cross-appeal filed in the District Court. This designation included the additional point that the District Court erred in excluding the income attributable to bags and bagging from the computation of the depletion deduction. The decision on this point below accords in principle with the Government's position in other cases (*United States v. Utco Products*, 257 F. 2d 65 (C. A. 10th); *Commissioner v. American Gilsonite Co.*, 259 F. 2d 654 (C. A. 10th), cert. den. March 2, 1959), and was designated as error in this case for protective purposes only (see *Riverside Cement Co. v. United States* (S. D. Cal.), decided September 30, 1958 (58-2 U. S. T. C., par. 9905)). Accordingly, this point is abandoned.

bonate. Mining is defined as including the ordinary treatment processes customarily applied by mine owners and operators to obtain the commercially marketable mineral product. The District Court found that Portland cement is the commercially marketable product for the taxpayer's limestone (a calcium carbonate) and held that the income attributable to other raw materials, some mined by the taxpayer and some purchased, which the taxpayer added to the limestone in making Portland cement are includible in the taxpayer's depletion base.

We contend that "ordinary treatment processes" within the term "mining" means processes applied to the mined mineral. The blending of other raw materials with the calcium carbonate involved here is not a "treatment" of the calcium carbonate, but is the blending of additional raw materials in order to obtain the physical or chemical composition of the product Portland cement.

With respect to the ingredients which the taxpayer mined, *i. e.*, clay #1, clay #2 (silica), tufa and gypsum, it is clear that the statutory scheme prevents these minerals from being depleted as calcium carbonate. These minerals were either depletable at different rates or not entitled to percentage depletion at all. Here, the District Court's decision has the anomalous result of depleting them all at the ten per cent rate allowed for calcium carbonate, and on the erroneous premise that they are ordinary treatment processes.

Similarly, the purchased additives, fluorspar and iron cinders, should be excluded from the depletion base. Presumably the fluorspar and iron have been depleted by those who mined them. If the taxpayer purchased all the ingredients it would get no depletion allowance. The result as to purchased minerals should not be different where it mines some and purchases others.

II.

There is no merit in the taxpayer's contention that the District Court erred in classifying its mineral as calcium carbonate, depletable at a ten per cent rate, rather than as chemical grade limestone, depletable at a fifteen per cent rate. The record in this case and the opinions in other cases demonstrate that limestone suitable for use in the manufacture of Portland cement is a calcium carbonate rock within the meaning of the statute. The testimony and documentary evidence unequivocally shows that the mineral mined by the taxpayer is unsuitable for chemical uses. This is true because of the low calcium carbonate content and the relatively high level of impurities.

It should also be noted that unless some adjustment is made to the District Court's computation, such as is urged by the Government under point I, the question of the classification of the taxpayer's mineral will have no effect on the amount of the refund and will, of course, be moot. This is due to the fact that the amount of percentage depletion is limited to fifty per cent of the net income from mining, which limitation has been exceeded even at the ten per cent rate for calcium carbonate.

ARGUMENT.

I.

In Computing the Taxpayer's Percentage Depletion Base Under Section 114(b)(4) of the Internal Revenue Code of 1939, Consisting of the Taxpayer's Gross Income From the Mining of Limestone, the District Court Erred in Failing to Exclude Income Attributable to the Additives Clay #1, Clay #2, Fluorspar, Gypsum, Tufa and Iron Cinders.

Section 23(m) of the Internal Revenue Code of 1939, Appendix, *infra*, provides that in computing net income there shall be deducted a "reasonable allowance" for the depletion of natural deposits. Section 114(b)(4) Appendix, *infra*, provides for the computation of this allowance by the percentage depletion method and states so far as pertinent here, that—

The allowance for depletion under section 23(m) in the case of * * * mines and other natural deposits shall be—

*	*	*	*	*	*	*	*
(ii) in the case of * * * calcium carbonates,							
and magnesium carbonates, 10 per centum,							
*	*	*	*	*	*	*	*
of the gross income from the property * * *.							
*	*	*	*	*	*	*	*

This section also states that the allowance shall not exceed 50 per cent of net income from the property (computed without allowance for depletion). Section 114(b)(4)(B) then defines "gross income from the property" as meaning the "gross income from mining," which is in turn defined as including—

not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes

normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, * * *

Thus, in making the depletion computation for a given mineral it is necessary to determine first “the commercially marketable mineral product” and then “the ordinary treatment processes” which are used to obtain that product, excluding any step, such as bagging, which does not qualify as an ordinary treatment process.

In this case the District Court found that the commercially marketable mineral product of the taxpayer’s limestone (held to fall within the statutory classification of “calcium carbonates,” see Argument, *infra*) was bulk Portland cement.⁴ [R. 65.] In computing the taxpayer’s “gross income from mining” the limestone, the court disallowed as ordinary treatment processes the cost of bags and bagging, royalties, trade discounts, transportation costs, and warehouse and bulk storage plant costs at distribution points. [R. 66-67.] However, the District Court refused to approve the Government’s position that income attributable to certain mined and purchased raw materials which were added to the limestone to make cement—clay #1, clay #2, fluorspar, gypsum, tufa and iron cinders—should also be excluded from the computation. [R. 54-60, 61.]

We concede that the act of blending raw materials is an ordinary treatment process in making Portland cement; that is, that the cost of labor, electricity, etc., used to physically mix the limestone with other raw materials may be included in the depletion base. However, we

⁴The question whether the taxpayer’s first commercially marketable mineral product was Portland cement or some lesser product is no longer in issue.

strongly urge that the income attributable to the added materials themselves⁵ should *not* be included in the depletion base.

To begin with, the depletion allowance is designed simply as taxfree compensation to the taxpayer for the part of its limestone deposit which it used up in production. See *Kirby Petroleum Co. v. Commissioner*, 326 U. S. 599; *Commissioner v. Southwest Expl. Co.*, 350 U. S. 308, 312; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503. In the computation approved by the District Court the taxpayer is not only allowed an offset for the depletion of the limestone deposit but is also allowed to deplete its other mined products (clay, gypsum and tufa) at the same rate, and in addition is allowed to deplete things which it does not even mine (fluorspar and iron cinders).

This unsound result is reached by characterizing the addition of these raw materials as an ordinary treatment process applied to the mined limestone. But the statutory phrase "ordinary treatment processes" has been interpreted, and correctly we submit, as being limited to processes applied to the mined mineral itself. Thus in *United States v. Utco Products*, 257 F. 2d 65, 68 (C. A. 10th), the court, in considering whether bags and bagging were includible in the depletion base, stated:

We are of the opinion that the phrase "ordinary treatment process," except where the statute otherwise provides, means a process of treating which separates the mineral from other minerals in which it is found or with which it is associated, or which effects a chemical or physical change *in the mineral*

⁵Or, alternatively, the cost or fair market value of the raw material additives.

itself, such as crushing, separating, removing impurities, pulverizing, hardening and the like. (*Italics supplied.*)

See also *Commissioner v. American Gilsonite Co.*, 259 F. 2d 654 (C. A. 10th), certiorari denied March 2, 1959. This language is a clear expression of the Government's premise that ordinary treatment processes, within the statutory meaning, includes only those steps which are in fact a *treatment* of the *mineral* being depleted.

The statute itself reinforces this position by stating in Section 114(b)(4)(B):

The term "ordinary treatment processes," as used herein, shall include the following: (i) in the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extracting of the product or products from ore, including the furnacing of quicksilver ores.

It is noteworthy that, in all the examples of ordinary treatment processes listed in the statute, the allowed processes are treatments applied directly to the ore or mineral. Nowhere does the statute indicate that the addition of another raw material will be viewed as an ordinary treatment process.

The District Court has apparently failed to appreciate the difference between a process and an ingredient. Just as a baker does not “treat” flour with milk, sugar, eggs and shortening to obtain the bakery product cake, so here the manufacturer of Portland cement does not “treat” limestone with clay, silica (clay #2), fluorspar, tufa, iron cinders and gypsum. In both cases the product is achieved by blending ingredients, instead of treating one raw material with another.

That the mined and purchased materials involved here are in fact raw materials or ingredients clearly appears in the record. After the limestone has been crushed and ground it is transported to the cement plant where it is placed in a hopper. Then [R. 22]—

The limestone [calcium carbonate] from its hopper is then blended with clay #1 from another hopper, with clay #2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.

After this “physical proportioning of the raw materials” [R. 18], the combination is mixed with water and further ground into a slurry which is fed into the kiln to emerge as a cement clinker. The clinker is then ground with gypsum to become one of the various types of Portland cement. [R. 21-24.] Thus, while it may be agreed that the act of blending is an ordinary treatment process, surely the position that the cost of these raw materials

should be included in the depletion base for calcium carbonate is indefensible.

A bulletin published by the Bureau of Mines (Bulletin 556, Mineral Facts and Problems, Bureau of Mines, 1956) demonstrates the reason for adding materials such as those used by the taxpayer. It states (p. 161):

A large number of raw materials theoretically is available for making portland cement, but the number has been reduced to a comparative few under existing commercial conditions. Argillaceous limestone, or "cement rock," of very close to the required lime-silica-alumina-iron oxides proportions sometimes is combined with minor quantities of other materials to produce the proper mixture. More often the necessary lime is supplied by one material (limestone, oystershells, or marl), the silica by sand or sandstone (or as a component in clays and shales), the alumina by clays and shales, and the iron oxide by iron-bearing materials or by high-iron clays and shales.

The four broad "type combinations" of portland cement raw materials, as classified in Minerals Yearbook, are (1) cement rock-pure limestone, (2) limestone clay (or shale), (3) marl-clay, and (4) blast-furnace slag-limestone.

* * * * *

Besides the major materials, the following minerals and other substances, some of which are used only very rarely, are among those added to help obtain a raw mixture of correct chemical and physical characteristics: Bentonite, diaspore, diatomaceous shale, fuller's earth, iron ore, mill scale, pyrite cinders and ore, diatomite, fluorspar, pumicite, flue dust, pitch, red mud and rock, hydrated lime, tufa, cinders, and calcium chloride.

See also Ex. 14, R. 119-120; Ex. 23, R. 129.

It is abundantly clear that the raw materials mined by the taxpayer and added to the limestone to make cement—Clay #1, clay #2 (silica), tufa, and gypsum—should not be included in the computation so as to be depleted as calcium carbonate. Here we have a taxpayer which mines five different types of natural deposits and is seeking to deplete them all as one type of deposit, and at the one percentage rate provided therefor, simply because they were all used in making cement. If the mined additives (the clay, tufa, and gypsum) are depletable at all, they are depletable at whatever percentage rates are provided as to each, not as calcium carbonate. And a second depletion deduction cannot be allowed on the ground that the addition of these raw materials to limestone is a treatment process in making cement.

As to the purchased ingredients, iron cinders and fluor-spar, the case is equally clear. This taxpayer does not mine iron ore or fluorspar. These materials have been mined by other taxpayers who presumably have claimed the statutory depletion allowance and cannot be depleted by a taxpayer who had no economic interest in their production. *Commissioner v. Southwest Expl. Co.*, 350 U. S. 308. Following this same theory, if a producer of Portland cement purchased all of the necessary ingredients he would not be entitled to any depletion allowance since he neither mines nor has a capital investment in the minerals. Can a different result with respect to purchased ingredients be justified when a producer mines some raw materials and purchases others?

The taxpayer on brief (p. 55) discounts “any superficial logic” of these arguments and suggests that it is neither absurd nor unusual to allow a double depletion allowance.⁶ In support of this view it points out that fuel oil and gas used for heat are derived from depletable resources yet are not excluded from the computation. However, the fuel oil and gas are typical examples of materials used in a process (here heating the kiln) as opposed to mineral components or ingredients used in physical or chemical proportioning. Thus, it is not the Government’s position that the cost of ordinary treatment processes should be excluded, but merely that the distinction between blending raw materials and processing or treating a mineral be reflected in the computation.

The taxpayer also cites (Br. 56-57) this Court’s decision in *New Idria Quicksilver Min. Co. v. Commissioner*, 144 F. 2d 918, as supporting a double depletion allowance for so-called additives. To begin with, it should be noted that this issue was neither raised nor ruled upon in that

⁶The taxpayer also maintains (Br. 49, *et seq.*) that the issue was covered by stipulation below which bars the appeal on this point. However, the stipulation provides [R. 21]—

that the *extraction and processing operations* set forth below for the mining of the calcium carbonate rock known as “limestone” are includable in determining gross income from mining * * *. (Emphasis supplied.)

There is no provision in the stipulation that the cost of additional materials or the income attributable to them should be included in the computation. Indeed, this issue was discussed in the Supplemental pretrial Memorandum for the Defendants, p. 27 [R. 142], and was discussed at length at the trial [R. 82-90, 92-94]. At one point the taxpayer expressed a willingness to concede the issue as to the purchase additives. [R. 111.] Finally, the Government introduced a proposed computation excluding these items which the District Court refused to adopt. [R. 54-60, 61.]

case. Moreover, that case involved the extraction of quicksilver from cinnabar ore and did not even implicitly rule on the blending of additional raw materials as an ordinary treatment process. There, slack lime was added to condensed quicksilver (p. 919) "to cleanse it and also to free the quicksilver."

Similarly, although the issue may have been present in other appellate decisions (see *e.g.*, *Dragon Cement Co. v. United States*, 244 F. 2d 513 (C. A. 1st), certiorari denied, 355 U. S. 833), it was not litigated or specifically considered. The lower courts have reached varying results. In *Riverside Cement Co. v. United States* (S. D. Calif.), decided September 30, 1958 (58-2 U. S. T. C. par. 9905), appeal pending (C. A. 9th), the same District Court held, pursuant to a concession, that the additive quartzite should be excluded from the depletion computation, but that other additives were includible.

In the *Sparta Ceramic Co. v. United States* (N. D. Ohio), decided November 12, 1958 (58-2 U. S. T. C. par. 9965), appeal pending (C. A. 6th), although certain additives were included as ordinary treatment processes, the court excluded the costs of glazing tile and remarked "Adopting the taxpayer's viewpoint, it could gold plate or stud the tile with diamonds. It is not believed that these additives could be considered in arriving at a proper depletion base." See also, *California Portland Cement Co. v. Riddell* (S. D. Calif.), decided November 21, 1958 (59-1 U. S. T. C. par. 9156), appeal pending (C. A. 9th).

In *Riverton Lime & Stone Co. v. Commissioner*, 28 T. C. 453, the Tax Court held that a producer of hydrated hydraulic lime correctly computed its depletion allowance by using the price received for sale of the pure product rather than the price received for sales which

included additives. See also *Black Mountain Corp. v. Commissioner*, 21 T. C. 746; *Iowa Limestone Co. v. Commissioner*, 28 T. C. 881, 883. In the latter case it was stated that "The blending of chemicals would not constitute ordinary treatment processes."

As is readily apparent from these decisions, the issue has received varying treatment in the lower courts and this case is one of first appellate impression.

It is submitted that a proper construction of the statutory language prevents the cost of or the income attributable to raw material additives from being included in the depletion base for calcium carbonate. Each mineral entitled to a depletion allowance must meet the statutory tests on its own and not, as here, be allowed some sort of vicarious depletion allowance by mislabeling it a treatment process. This result, it is submitted, is not only legally sound but is also dictated by logic and reason. As this Court stated in *Brea Canon Oil Co. v. Commissioner*, 77 F. 2d 67, 69:

While the act of Congress and regulations adopted in pursuance thereof must be construed according to their plain import, it should be borne in mind in determining the amount of the depletion allowance that such allowance is intended to represent the amount of capital recovered in the product produced by the well [mine], that is the value of raw product.

Such a principal precludes the inclusion of raw material additives in the computation of the depletion allowance for calcium carbonate.

II.

The District Court Correctly Held That the Mineral Mined by the Taxpayer Was Calcium Carbonate Rather Than Chemical Grade Limestone.

As detailed earlier, the statute (Sec. 114(b)(4) of the Int. Rev. Code of 1939) provides for depletion allowances for specified minerals in stated percentages of the gross income from mining the mineral, but subject to the limitation that in no event shall the allowance exceed 50 per cent of the *net* income from mining. The taxpayer here asserts that the District Court erred in classifying its limestone as calcium carbonate (10 per cent), rather than as chemical grade limestone (15 per cent). It should be noted at the outset that, as the District Court's computation now stands [R. 66-67], the net income limitation is in effect and the question of whether the taxpayer is entitled to the 10 per cent rate or the 15 per cent rate is moot. However, since the taxpayer feels it is aggrieved in other ways by this holding and since the issue may again become important if the Government's position in Point I is accepted,⁷ the taxpayer's contention that the District Court erred in this respect will be dealt with herein.

The District Court found [R. 63] that the taxpayer "mined a calcium carbonate rock known generally as

⁷Under the computation approved by the District Court [R. 66-67] the 10 per cent allowance for calcium carbonate is \$666,362.24, but 50 per cent of the net income from mining is \$628,820.89. Thus, the maximum depletion allowance, whether the applicable rate is 10 or 15 per cent, is the same, namely, \$628,820.89. However, if the Government is right on the question of additives, *supra*, and its proposed computation [R. 56-60] is accepted, there will again be a dollar amount controlled by the depletion rate, since under that computation the net income limitation is higher than the 10 per cent rate for calcium carbonate.

‘limestone’ ” and further found [R. 64] that “The calcium carbonate content of plaintiff’s limestone involved in this case was not high enough to qualify the material as ‘chemical grade limestone’ * * *.”

There is ample support for the holding that the taxpayer’s mineral is calcium carbonate. Treasury Regulations 111, Section 29.23(m)-5, Appendix, *infra*, define calcium carbonate as—

Miscellaneous limestones and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) such as cement rock and limestone used or sold for use in soil treatment. This classification does not include rock or minerals used or sold for use as ballast, road making, concrete aggregates, or other purposes for which chemical composition is not a major requirement.⁸

Thus, taxpayer’s limestone is a “calcium carbonate” if, contrary to the taxpayer’s contention, it is not “chemical grade limestone” entitled to depletion at a 15 per cent rate. Cases involving limestones similar to taxpayer’s have consistently applied the 10 per cent rate provided for calcium carbonates. See *Dragon Cement Co. v. United States*, 144 F. Supp. 188, 189 (Me.), reversed on other grounds, 244 F. 2d 513 (C. A. 1st), certiorari denied, 355 U. S. 833; *California Portland Cement Co. v. Riddell*, *supra*; *Riverside Cement Co. v. United States*, *supra*.

As the District Court held, the taxpayer’s limestone was not chemical grade limestone. The court found [R. 70] that chemical grade limestone means “a limestone

⁸A recently proposed regulation would amend this definition by striking all after “cement rock” and substituting “and agricultural limestone.” 24 Fed. Register, No. 28, pp. 975, 976.

which is of a relatively high calcium carbonate content.” This definition is not only supported by the evidence of record in this case but also coincides with judicial and administrative meanings given the term. In *United States v. Wagner Quarries, Co.*, 260 F. 2d 907, 908 (C. A. 6th), the court stated:

Based upon a fair appraisal of the testimony of the experts, a reasonable interpretation of congressional intent in using the words “metallurgical grade limestone, chemical grade limestone,” would mean a limestone of high carbonate content with a very low silica or impurities percentage, capable of use for metallurgical or chemical purposes.

In *Iowa Limestone Co. v. Commissioner*, 28 T. C., p. 884, it was stated:

The record shows that limestone which is at least 95 per cent pure, free from toxic impurities, and containing not more than 1 per cent moisture, is known in industry and commerce as chemical grade limestone.

While the applicable Treasury Regulations (Reg. 111, Sec. 29.23(m)-5) define chemical grade limestone merely as “Limestone used or sold for use in the chemical trades,” this use test has been abandoned after rejection by the courts (*e.g.*, *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553) and newly proposed Regulations conform to the above definitions.⁹

It is apparent from the chemical analysis of the taxpayer’s calcium carbonate that it does not qualify under

⁹“Limestone, chemical and metallurgical grade. Limestone containing a calcium carbonate and magnesium carbonate content totaling 95 percent or higher by weight provided that such magnesium carbonate content is less than 35 percent by weight.” Proposed Treasury Regulations, 24 Fed. Register, No. 28, pp. 975, 976.

any of these definitions of chemical grade limestone. The average calcium carbonate content of the taxpayer's mineral is 85.20 per cent [R. 64], well below the requirements of 95 per cent. Nor, does this percentage qualify as "relatively high" or "high" calcium. [R. 70.] The record shows that "Limestone containing more than 95 per cent Ca CO_3 is commonly referred to as high-calcium limestone." [Ex. 15, R. 120-121.]

In addition, the impurities contained in limestone are of crucial importance in determining whether a limestone is of chemical grade. See the specifications for various chemical uses of limestone reproduced in Stipulation No. 1. [R. 34-38.] The relatively high level of impurities in the taxpayer's mineral (particularly silica (Si O_2) and alumina (Al_2O_3)) [R. 21] make it unsuitable for many chemical uses such as the manufacture of glass, calcium carbide, alkalies and paper. [R. 34-38.]

The taxpayer takes exception to the District Court's definition and would define chemical grade limestone as "limestone suitable for use in any industrial chemical application." (Br. 16.) Therefore, the argument runs, since the production of Portland cement involves complex chemical reactions, limestone suitable for use in the manufacture of Portland cement is chemical grade limestone.

The fallacy of this argument is that it ignores the accepted meaning of the term "chemical grade limestone," which refers to a relatively pure limestone of high carbonate content. There is nothing in the record to suggest that any limestone which is capable of being used in a chemical reaction is automatically chemical grade. Moreover, even if Portland cement manufacture were conceded to be a chemical industry (which it is not) the test is not how a particular mineral is actually used, but is whether

it qualifies under commonly understood commercial meanings. See *e.g.*, *Virginian Limestone Corp. v. Commissioner*, *supra*, where the mineral was held to be depletable as dolomite (10 per cent) even though some of it was sold for use as metallurgical limestone (15 per cent).

That the industry is well acquainted with chemical grade limestone as a term which is used to describe limestones useable for such chemical purposes as alkali manufacture, calcium carbide manufacture and in the glass, paper and sugar industries clearly appears from the deposition of a qualified expert, Dr. Bowles. [R. 124-126.]

The taxpayer's reliance (Br. 29-31) on Rev. Rul. 56-582, 1956-2 Cum. Bull. 981, to prove syllogistically that it mines a chemical grade limestone is equally misplaced. Initially, it should be noted that the ruling refers to the production of lime by the calcination of calcium carbonate (CaCO_3), and the record here is clear that the taxpayer's deposit could not be used in the production of lime. [Ex. 23, R. 127.]¹⁰ Moreover, the end use method of classifying limestone as set forth in this ruling was specifically rejected in *Wagner Quarries Co. v. United States*, 154 F. Supp. 655 (N. D. Ohio), affirmed, 260 F. 2d 907 (C. A. 6th), and is no longer being urged by the Government.

In summary, the allowance of a depletion deduction is a matter of legislative grace (*Commisisoner v. Southwest*

¹⁰Dr. Oliver Bowles deposed as follows [R. 127]:

Q. Would you consider a limestone used for lime manufacture as a chemical limestone?

A. Yes. I would.

Q. Why would you do so, when you rule out limestone for cement manufacture?

A. Because limestone used for lime manufacture is generally, or almost invariably, a very high grade. A large part of the lime manufactured in the United States is made from stone running more than 98 per cent calcium carbonate.

Expl. Co., 350 U. S. 308) and the burden was upon the taxpayer to prove entitlement to the allowance for chemical grade limestone. There is in this case ample judicial precedent and record support for the District Court's holding that the taxpayer mined calcium carbonate rather than chemical grade limestone.

Conclusion.

For the reasons stated above, the case should be remanded to the District Court to exclude from the depletion base for calcium carbonate the income attributable to other mined and purchased raw materials. In all other respects the decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

For percentage depletion allowable under this subsection, see section 114(b), (3) and (4).

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * *

(4) [as amended by Sec. 145(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798; Sec. 124 of the Revenue Act of 1943, c. 63, 58 Stat. 21; and Sec. 319(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Percentage depletion for coal and metal mines and for certain other mines and natural mineral deposits.*—

(A) *In general.*—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum.

(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum,

(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum, and

(iv) in the case of sulfur, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance from section 23(m) be less than it would be if computed without reference to this paragraph.

(B) [as amended by Sec. 304(d), Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137; and Section 207(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Definition of gross income from property.*—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining" as used herein shall be considered to include not merely the extraction of the ores or minerals

from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills. The term "ordinary treatment processes," as used herein, shall include the following: (i) in the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles

of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 450 and 453.

(26 U.S.C. 1952 ed., Sec. 114.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1. *Depletion of Mines, Oil and Gas Wells, Other Natural Deposits, and Timber: Depreciation of Improvements.*—Section 23(m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

* * *

When used in these sections (23.23(m)-1 to 23.23(m)-28, inclusive) covering depletion and depreciation—

* * *

(d) [As amended by T.D. 5413, 1944 Cum. Bull. 124] “Minerals” include ores of the metals, coal, oil, gas, and such nonmetallic substances as abrasives, asbestos, asphaltum, barite, beryl, borax, building stone, cement rock, clay, crushed stone, feldspar, fluorspar, fuller’s earth, graphite, gravel, gypsum, lepidolite, limestone, magnesite, marl, mica, mineral pigments, peat, potash, precious stones, refractories, rock phosphate, salt, sand, silica, slate, soapstone, soda, spudomene, sulphur, talc and vermiculite.

* * *

(f) [As amended by T.D. 5413, *supra*; T.D. 5458, 1945 Cum. Bull. 45; T.D. 5461, 1945 Cum. Bull. 284; T. D. 6004, 1953-1 Cum. Bull. 45; T.D. 6031, 1953-2 Cum. Bull. 120] The term “gross income from

the property,” as used in sections 114(b)(3) and 114(b)(4)(A) and sections 29.23(m)-1 to 29.23(m)-19, inclusive, means the following:

In the case of oil and gas wells, “gross income from the property” as used in section 114(b)(3) means the amount for which the taxpayer sells the oil and gas in the immediate vicinity of the well. If the oil and gas are not sold on the property but are manufactured or converted into a refined product prior to sale, or are transported from the property prior to sale, the gross income from the property shall be assumed to be equivalent to the representative market or field price (as of the date of sale) of the oil and gas before conversion or transportation.

In the case of a crude mineral product other than oil and gas, “gross income from the property,” as used in section 114(b)(4)(A), means the gross income from mining. The term “mining” as used herein includes not only the extraction of ores or minerals from the ground but also the ordinary treatment processes which are normally applied by the mine owners or operators to the crude mineral product after extraction in order to obtain the commercially marketable mineral product or products. * * *

If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, “gross income from the property” means the amount for which such product was sold, but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, “gross income from the property” means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as benefited by the ordinary treatment processes actually applied, before transportation of such product (other than transportation treated, for the taxable year, as mining). If there is no such representative market or

field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation (other than transportation treated, for the taxable year, as mining) and the processes beyond the ordinary treatment processes. If the taxpayer establishes to the satisfaction of the Commissioner that another method of computation, other than the computation of profits proportionate to costs, clearly reflects the gross income from the property, then such gross income shall be computed by the use of such other method. For a description of transportation which is treated, for taxable years beginning after December 31, 1949, as mining, see the preceding paragraph and section 114(b)-(4)(B), as amended.

The term "ordinary treatment processes," as used herein, shall include the following:

(1) In the case of coal—cleaning, breaking, sizing and loading for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment;

(3) In the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering (agglomerating by incipient fusion) to bring to shipping grade and form, and loading for shipment;

(4) In the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash and minerals which are not customarily sold in the form of the crude mineral product—crushing, grinding, and

beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic) cyanidation, leaching, crystallization, precipitation, or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the mineral. The furnacing of quicksilver ores is included in the term "ordinary treatment processes." The following processes are not included in the term "ordinary treatment processes"; electrolytic deposition, roasting, thermal or electric smelting, refining, or substantially equivalent processes.

In addition, the processes listed below are not included in the term "ordinary treatment processes" unless such processes are (i) otherwise provided for in (1), (2), (3), or (4) above; (ii) necessary or incidental to the processes provided for in (1), (2), (3), or (4) above; or (iii) necessary to bring the ores or minerals into condition or form suitable for shipment (for example, the agglomeration of concentrates):

- (A) treatment effecting a chemical change,
- (B) blending with other material,
- (C) thermal action,
- (D) fine pulverization, pressing into shape, or molding.

For the purposes of (3) and (4) above, the terms "concentration" or "concentrating" mean the process of eliminating waste or of separating two or more minerals or ores.

* * *

(h) "Crude mineral product," as used in paragraph (f) of this section, means the product in the form in which it emerges from the mine or well.

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SEC. 29.23(m)-5 [As amended by T.D. 6031, *supra*]. *Computation of Depletion Based on Percentage of Income in Case of Certain Mines or Other Natural Deposits.*— * * *

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For the purposes of this section, the minerals indicated below shall have the following meanings:

* * *

Calcium carbonates.....	Miscellaneous limestone and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) such as cement rock and limestone used or sold for use in soil treatment. This classification does not include rock or minerals used or sold for use as ballast, road making, concrete aggregates, or other purposes for which chemical composition is not a major requirement.
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Limestone, chemical grade.....	Limestone used or sold for use in the chemical trades.
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Limestone, metallurgical grade..	Limestone used or sold for use in the production of metals.
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Stone.....All common dimension, crushed or broken stone within the ordinary meaning of these terms.

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